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TRADE REMEDIES

HEARING

BEFORE THE

SUBCOMMITTEE ON EXPORTS, TOURISM, AND SPECIAL PROBLEMS

OF THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

FIRST SESSION

WASHINGTON, DC, JULY 9, 1987

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TRADE REMEDIES

THURSDAY, JULY 9, 1987

House of Representatives,
Subcommittee on Exports, Tourism,
and Special Problems,
Committee on Small Business,
Washington, DC.

The subcommittee met, pursuant to notice, at 9 a.m., in room 2359-A, Rayburn House Office Building, Hon. Ike Skelton (chairman of the subcommittee) presiding.

Mr. Skelton. We will call our hearing to order this morning.

We are here today to learn about two proposals which call for trade remedy assistance for small businesses. These proposals, H. Con. Res. 76* offered by Mr. Pickle and H.R. 1737,* the Small Business Trade Relief Act of 1987, offered by Mr. Ridge, seek to make it easier for small businesses to use the U.S. system of trade laws. They propose, however, two very different ways of doing it. Both bills have been assigned to this subcommittee for consideration.

During our hearings on the Trade bill, the Small Business Committee concentrated on ways to encourage small businesses to take advantage of opportunities in international trade. The committee found that even a small increase in overall small business export performance can have an enormous impact on our balance of trade.

Another way for us to decrease our trade deficit is to protect domestic businesses from dumping, counterfeiting, patent infringement, denial of market access, and other trade-related complaints.

To carry out these policies, the Congress and the President have established a network of treaties, bilateral agreements, and trade laws which are designed to protect both our international and domestic businessmen. Unfortunately, international trade in recent years has become so sophisticated and American trade laws so complex, that the costs to both businesses and the Nation are more than we can afford to bear.

The costs of unfair trade practices are enormous. The most obvious of these costs is the price of bringing an action under our trade laws to defend our rights. We will hear today from companies who have spent over half a million dollars and still have no real relief. Justice at that price for a small business, frankly, is no justice at all.

Less obvious are the costs to the individual business in lost productivity and diminished competitiveness when that business is forced to devote a great deal of time and divert precious resources to a non-productive activity such as filing a trade law claim.

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*H. Con. Res. 76 and H.R. 1737 may be found in the appendix.

And finally, as this subcommittee considers what our policy should be, we must consider the cost to the country—small businesses who are unable to defend themselves from the theft of their intellectual property or from other unfair trade practices because they are closed out of our trade remedy system have very few options. They can close their doors. They can sell out to a larger company. They might decide that it is more profitable to move their operations overseas.

If a company has developed a unique product or a special technology that is being pirated, it may be forced to sell or lease that technology to the highest bidder, which is likely to be a foreign competitor.

None of these alternatives are acceptable. The cost to the Nation in lost jobs, lost production base, and lost technology is one that our trade laws should minimize, if those laws are used by the businesses who need them.

The proposals before the subcommittee today focus on the practical ways to bring trade remedy assistance within the reach of small businesses.

For our first panel today we have Don deKieffer of Pillsbury, Madison & Sutro, Washington, DC; Eric Garfinkel, Anderson, Hibey, Nauheim & Blair, Washington, DC, and Harry Rasmussen, the executive vice president of Crest Industries, Inc.—and I can't even pronounce it—in Washington.

Harry Rasmussen first.

TESTIMONY OF HARRY R. RASMUSSEN, EXECUTIVE VICE PRESIDENT, CREST INDUSTRIES, INC., PUYALLUP, WA

Mr. **Rasmussen**. I am Harry Rasmussen.

Mr. **Skelton**. Where are you from?

Mr. **Rasmussen**. Seattle, WA.

Mr. **Skelton**. No, that is not what it says.

Mr. **Rasmussen**. Well, it is Puyallup.

Mr. **Skelton**. There you go.

Mr. **Rasmussen**. I say Seattle because Puyallup is kind of out of the way. We are about 30 miles from Seattle.

I am a small businessman from that area and I seem to be getting smaller. In 1969, I had worked for the Bell System for about 20 years. I started a small business, borrowed $850 from the local telephone credit union.

By the 1980's, we were at about $6 million gross sales. All of these products were proprietary—we own the patents on them. I never before manufactured products. About that time we had designed a system that was instrumental in changing the basic way that key systems were made for small businesses.

We invested some $3½ million—around $3 million—to bring this product to market, both in design and to get the marketplace to convince the telephone companies this was a good product. About the time we were in production, we were picked off by Taiwan imports. Some company and some people in the United States sent our product overseas, had it copied, brought it in, and actually submitted letters to our distributors—six of them—saying, why are you buying Crest when you can buy a copy for much less?

We have, since that time, up until today, lost—it cost us about $10 million—that is our loss. We were planning on about someplace between $12 and $16 million worth of sales by these customers.

When this hit we were caught with $1.7 million worth of inventory that we have to dump at cost, or less, because we just can't compete with those imports.

I think that besides the fact that it is so costly to patent, and it is impossible for a company my size to protect those patents—there is no way that I can. There are six copies of my patents from big companies.

In 1987, ITT has agreed to pay us royalties on these patents. Those patents were assigned to the Netherlands, manufactured in Taiwan and distributed throughout the world. So, even the product assigned to a large company has left the country.

We had 80 people working for us at one time. The ripple effect of those 80 people was probably another 100, because we do subcontract a lot of work out—plastic molding, stuffing, and things like that. So the impact has been very great on us.

I think the thing that is lost in all this is that not only the cost of protecting our patents and these kinds of things, but the American manufacturer cannot afford to spend that kind of money—$3 million—to develop a product and to make the marketplace, and then have somebody walk in to our distributors and just take the product. Their investment is nothing. I can't keep doing that over, and over, and over again.

The money that we have made, or did make, off some of the products went right into the next family of products. We have other new ideas that we just can't afford to build on now so we are just about at a standstill.

Another thing, the copycat thing, has really hit us hard. Another example is our distributors, again, competitors walk in, pick out the high volume products out of the distributors. Now, the distributors do no sales. We, as manufacturers, promote our own sales. We promote these sales. We get everything set up we are selling. Between the distributor and a foreign manufacturer, they pick off the high volume and leave us with the low volume things that are just products that we carry for add-ons.

Just in the first month this copy cost us $20,000 worth of sales through one distributor.

Could I pass these out?

Mr. SKELTON. Yes, please do.

[Product distributed to subcommittee members.]

Mr. SKELTON. Mr. Rasmussen, would you be kind enough to tell us what these are?

Mr. RASMUSSEN. This is a transfer key that was designed between 1973 and 1975. It used to be—you have probably seen them on your own phones—used to be a big metal box with a key on them. We have sold some—since 1973, the Bell System has used quite a few million of these things. You have probably seen them on your own telephones around the country.

Mr. SKELTON. I think we have one in our office.

Mr. RASMUSSEN. Right.

We have 15 models of this. Only the two top high number models were picked off by the Taiwanese. And, of course, it has to be in concert with the distributors—they have no investment in it. We have gone to some of our customers and asked them to pull these out of inventory and tell us which one they have, and we found that they have Taiwan and they are in our bags. There is no Taiwan mark on that or anything.

So what the distributor is doing is pulling these in and dropping them into a bag with our parts numbers on them. They are changing that now. But I say the first month of one distributor is $20,000 worth of sales on just that one item. This has hit us after the telephone design problems.

To go back to the telephone, from the beginning we had about six companies use this system. What happened is, the design that we made in 1975, the Bell System components was $8,000. If you had a small business with six telephones, you had 600 wires coming back to a roomful of equipment; you had $8,000 worth of equipment. Our design used four wires and that serviced all the phones. The cost of the phone was around $110 per telephone; so if you had six telephones, you had six times $110. You had five more features. You would work five miles from each telephone, between each telephone. The old equipment only ran 300 feet from that equipment.

We almost stopped the market with that item, and that is what was picked up by the imports. Everything is contained within that telephone and everybody that is building a self-contained telephone now is using our patents, and we can't touch them.

Now, we did go to the one that we thought we could pick off. One of the companies that was using it—their division is $16 billion, so I couldn't pick him off. So we tried to get the one that we thought we could take.

We went and filed with the International Trade Commission. We thought it would be a cost that we could handle. Our first bill was $50,000. They said that this wasn't even starting. $250,000–$300,000 was the next thing we heard—times six, we couldn't afford.

We dropped the case because of no funds, and they judged prejudice—we can't ever pick it up again. Now, I think that was very unfair to drop us with prejudice because we couldn't afford to fight. And that excludes us from picking off these people again.

The company that did import these started out very small. They are very large now, and all their models use our patents.

Mr. SKELTON. Have you finished your testimony, sir?

Mr. RASMUSSEN. Go ahead.

Mr. SKELTON. I was going to interrupt this panel with the gentleman from New York, a Member of Congress, Mr. Downey.

Have you finished your direct testimony?

Mr. RASMUSSEN. Go ahead.

Mr. SKELTON. We are going to have questions of the panel at a later time.

Mr. RASMUSSEN. That is fine.

Mr. SKELTON. All right, fine.

[Mr. Rasmussen's statement may be found in the appendix.]

Mr. SKELTON. The Chair will now recognize Mr. Tom Downey from New York to testify. We appreciate you being with us here.

TESTIMONY OF HON. THOMAS J. DOWNEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. DOWNEY. Mr. Chairman, thank you, and I want to thank the other members of the panel for coming to listen. This is a matter that, as the gentleman to my right has just explained, is close to my heart and close to the hearts of the members of the Ways and Means Committee.

Mr. Chairman, as a member of that Committee on Trade, I am very much aware of the important contribution that small business makes to U.S. trade. Unfortunately, I am also very much aware of the great difficulties confronting small businesses which enter the world export market.

In March of this year while the Trade Subcommittee was considering H.R. 3, I joined my colleagues, Mr. Pickle and Mrs. Kennelly, Mr. Frenzel, Mr. Matsui, and Mr. Archer, in introducing H. Con. Res. 76, which expresses the sense of the Congress supporting a private, independent organization which would provide pro bono legal assistance to small businesses with cases involving foreign unfair trade practices.

The pro bono firm would engage in an active outreach program to inform small businesses of remedies available to U.S. businesses suffering from unfair trade practices. It would provide legal assistance to those small businesses seeking remedies in trade law which cannot afford to bring the cases themselves.

We are all aware of the importance of small business to the American economy. The small business community has contributed a great deal to the growth of employment in the 1980's. All of us can attest to the dynamism of small businesses in our own congressional districts. In certain fields, related to high technology in particular, small businesses have been the cutting edge of American production advances. If we are going to reduce our trade deficit we must find ways to boost the contribution of these small businesses to our total trade effort.

Small businesses have not always been able to take advantage of the opportunities that world trade offers them. Presently only about 10 percent of small businesses are actually exporting their products. Clearly, the potential for expanded trade is great. But for a small business seeking to develop overseas markets, there are many hurdles which must be overcome—hurdles that may seem relatively minor to a Fortune 500 corporation but appear all but insurmountable to many small businesses.

There are problems of market research, financing, tariffs, the maze of non-tariff barriers, and maintenance of distribution networks and after-sales services overseas. Assuming that these hurdles are all safely and successfully overcome, there is always the distinct possibility that the newly successful company will encounter other barriers to trade.

What can we do to help them? H.R. 3, the House's passed Trade bill, strengthens U.S. trade laws, especially section 301, which deals with foreign unfair trade practices. Stronger laws will help every American business that engages in international trade, but I believe that they will be particularly helpful to small businesses which do not have great resources.

Let me give you an example similar to the one that the gentleman has just given you, of products and problems confronting small businesses entering the foreign markets.

In 1983, I first spoke with the owner of Rosco Tools, a hand tool manufacturer then located on Long Island in my congressional district. Rosco was an old, established small business which had strong sales of hand tools such as screwdrivers in the American market. They had pervasively penetrated the New York/Long Island area and much of the East Coast of the United States, and they attempted to take their operations overseas. It was a quality product. It had a very good reputation.

When Rosco tried to market its screwdrivers in the Philippines, it discovered that screwdrivers bearing Rosco's trademark, including some of the small copyright numbers, already being sold in the Philippines were Rosco tools, but they weren't made by the Rosco Corporation. Producers in Taiwan were counterfeiting the screwdrivers and producing an inferior product. Under U.S. trade law at the time, there was not a great deal that could be done.

In 1984, I introduced an amendment to the legislation renewing what we call GSP, the Generalized System of Preferences, which made the continuation of a country's GSP benefits conditional on its commitment to stopping commercial counterfeiting. The adoption of this amendment added a critical provision to U.S. trade law.

With the enactment of the 1984 trade bill, Rosco Tools had some recourse because Taiwan was a major recipient of GSP benefits. Unfortunately, during the time it took to enact the 1984 trade bill, the owner sold Rosco Tools and retired.

This year, in H.R. 3, the House has incorporated even stronger language which I introduced, providing greater intellectual property protection for U.S. business. Were Rosco still in business, it could bring a 301 case on an expedited basis against the trademark pirates.

There are other ways in which we have improved the chances for small business in the international marketplace. But to the extent that these measures' effectiveness depends on the familiarity of small business owners with U.S. trade law and their ability to sustain a long legal process, these measures may not be of much use to the average small business owner. And, again, the gentleman pointed out a $30,000 initial legal fee—anybody who is prepared to stay in this through the course would have a much heavier fee.

How many of the small business owners, rhetorically, I ask you, in our districts have followed the drafting of the trade bill? Unless they need it as a way to fall asleep at night, I dare say there are not very many.

How many of them know about the section 301 reforms? How many of them know that section 301 provides U.S. businesses with protection from unfair foreign trade practices? And, finally, even if they know all of this, how many can afford to bring a case under section 301?

During Ways and Means Committee hearings on the intellectual property provisions, I was struck by the testimony of a businessman from Congressman Pickle's district. He was the victim of patent pirates who sold copies of his product. Ironically enough, the product that he made was a small metal prod, electric prod, that a woman might carry in the event she was—it was actually a stun gun—if she were accosted, you could get fairly close to the person accosting you and zap this person with some 1,500 volts of electricity, causing no permanent injury, but certainly riveting the attacker's mind on the fact that this gun had an impact, and it was non-lethal.

He sought relief first in the U.S. courts, and although he won his cases, he could not stop the patent infringement. He then initiated a section 301 case—had he initiated one, his case would have been much better.

I believe that a pro bono legal assistance firm would be a great help to small businesses. Trade law is arcane, to say the least, and it is expensive. But business needs the protection it affords. Business people need to know that they can get relief from unfair trade practices. They need to know where to go to get that relief. And they need to have an effective advocate throughout the process.

H. Con. Res. 76 urges the private sector—the business, labor, legal, and academic communities—to support such a private effort. Washington and other commercial centers abound in lawyers skilled in trade law. A private effort would be able to coordinate and support the efforts of those lawyers willing to take such cases.

In passing H.R. 3, the House has tried to toughen our trade laws. If the House passed H. Con. Res. 76, which today has 77 cosponsors, it would send a clear signal to the private sector that they need to play a more active role in seeing that small businesses enjoy the full benefits of our tougher trade laws.

And for those of you who are experts and follow the issue of small businesses carefully—I don't want to beat this point to death—but it is easy for us to encourage small businesses to get out there and trade in the world market, which is, to say the least, a jungle. I believe that the new trade bill will discourage piracy and copyright violations. But the only way we can ensure the necessary follow-through for small businesses to compete and to be protected against copyright infringement, is if they are given legal help in the event that that doesn't happen. And they are simply not capable, in my opinion, of doing that themselves without a little assistance. And this private corporation as opposed to some public entity, I believe, would be a very, very useful tool to aid those people who we have been encouraging to get out there and do exporting.

Thank you, Mr. Chairman.

Mr. **Skelton**. Mr. Downey, thank you so much.

Questions, Mr. Ireland?

Mr. **Ireland**. No questions, thank you.

Mr. **Skelton**. Yes, Mr. Bilbray?

Mr. **Bilbray**. Thank you.

I also serve on the real Trade Committee on Foreign Affairs—it is a little inner House rivalry. Some of the things we found also are, for instance, the Department of Commerce spent hundreds of thousands of dollars preparing necessary documents on how to help small businesses compete in the international market. They sold that for $400 apiece, and very few copies were sold.

The Japanese took it, translated it, and gave it out to their businesses all through Japan free of charge, after we spent hundreds of thousands of dollars preparing it.

Your plan is basically to allow some sort of stipend or aid to private attorneys to aid small businesses in their fights against these bigger corporations. Is it just because you don't have any faith in the Department of Commerce to add to their staff to help us or——

Mr. DOWNEY. I would say to my friend Mr. Bilbray, that it is not a question of faith in the Department of Commerce. First of all, all we are talking about is the sense of the Congress here. We are not talking about implementing the legislation. I mean, we are not talking about setting this up. This clearly has to be a private operation—that is what we are talking about, encouraging people to set it up privately. How the method of payment to the attorneys could be set up would be left to the imaginations of the people establishing it.

You can make the argument—Mr. Ridge of this committee does, for instance, I believe it is H.R. 1737—that within the Small Business Administration there be an agency of government to actually help in the filing of section 301 cases.

Mr. BILBRAY. It is like this gentleman's problem here—I don't know if you heard it all because you came in late. The magnitude of the cost of fighting a pirate from Taiwan, is just like in your constituent's problem. Is the magnitude too great?

Mr. DOWNEY. Yes.

Mr. BILBRAY. They, even with help, and with reduced costs, because of some catalyst that we create, are not going to work. He is going to have to spend millions of dollars to stop these pirates. He spent $3.5 million just in R&R to develop his product and then, boom, it is gone.

I think we have got to go a little further. We have got to find methods of really punishing companies that continually pirate; countries that continually allow, as we discussed regarding sanctions against the countries that continually allow pirating to go on. This is a good idea you have but I am not sure it comes close to——

Mr. DOWNEY. Let me just say to my friend that not for a second do I consider this to be one of the larger weapons in the arsenal against unfair trade practices or copyright infringement practices. If I can just take one minute of the committee's time to explain that in the Trade bill, in the area of trademark and patent, which was my area of interest—though it has been a while since I have thought about it, I would not hasten to add expertise—that we have set out a requirement where USTR would list the countries that are the most onerous in not obeying international copyright and trademark law and then go after them. And if we could initiate the action nationally, and if it is against an individual company, they have a fast track to do that as well.

The USTR has within its power a whole battery of retaliatory measures he or she may take against the offending country. The presumption is that the country so punished would, in fact, go after its own company. Now, that may seem to you to be naive and unworkable—we will know in a little while.

In the meantime, for the individual small business companies, something has to be done in additional help to get them to be able to, if they want to, take a section 301 case specifically. And you could come up with a different remedy. I would not be adverse to the idea of a governmental entity as long as we understood that it may be in an adversarial position with USTR. I mean, that is the problem with a governmental entity, that on the one hand you are going to have one agency of the government possibly bringing an action against the other.

We have done that in the past. Remember the skittishness we all have, mostly philosophical, about the Legal Services Corporation from time to time going against other agencies of government. But if you wanted to finance this through SBA, then be aware that you have this fairly daunting problem of one agency in an adversarial position with another. That is why we talk about the private corporation.

The businesses need help—if you take a free market approach to this, you can just say, well, you know——

Mr. **Bilbray**. The only way that we would do that is if the private corporation would, in some way, be funded—and to a great extent. There is not going to be a free lunch. There is no way this gentleman is going to go on, and I don't think a lot of our small businesses can compete continually on a level with this kind of money coming in from Taiwan or Japan, the pin. I guess the most horror stories seem to be from Taiwan.

I was wondering—and maybe this question is just not for you, Mr. Downey, does not the government bring the legal action permitted under the United States Code against those people that distribute pirated or illegal trademark items?

Mr. **Garfinkel**. The answer is that——

Mr. **Skelton**. Please identify yourself for the record.

TESTIMONY OF ERIC I. GARFINKEL, ATTORNEY, ANDERSON, HIBEY, NAUHEIM & BLAIR, WASHINGTON, DC

Mr. **Garfinkel**. My name is Eric Garfinkel. I am here to testify about a pro bono legal fund which is in the process of being established along the lines discussed by Congressman Downey.

In response to your question, section 337 cases which would typically be brought in response to pirating that relates to imported items are brought in almost all circumstances by domestic companies that are having those problems.

Section 301 cases are filed by the United States Government or prosecuted by the United States Government at the request of a private company.

Mr. **Bilbray**. The law seems to permit this, but that shouldn't be. This gentleman should have had help from our own government and they should have gone right after the distributors that were distributing these illegal items. They should have prosecuted them and brought charges against them.

Mr. **Garfinkel**. Currently there is no provision in the law for self-initiation of section 337 cases by the government, and that is where his remedy happened to lie in this particular case.

Mr. **Bilbray**. What happened when he filed a complaint that got no response?

Mr. **Rasmussen**. He did file a complaint but he had to pay the costs associated with that.

Mr. **Bilbray**. The government doesn't do anything to protect him?

Mr. **Garfinkel**. No; they will just review his complaint—and he had to go before an Administrative Law Judge and go through discovery. I didn't handle his case but that is where the cost comes in, through the litigation process associated with the factfinding.

Mr. **Downey**. Does the $50,000 initial fee sound a little steep to you?

Mr. **Garfinkel**. No, $50,000 is probably relatively low in terms of getting a petition filed and before the Commission. His case, as I understand it, never even went before the ALJ. It was merely filed for the first $50,000 and then the rest of the case probably would have eaten up another $150,000 to $200,000.

Mr. **Skelton**. Mr. Mfume?

Mr. **Mfume**. No questions.

Mr. **Downey**. It sounds like the business one wants to go into just to file cases for $50,000.

Mr. **Skelton**. Mr. Ireland?

Mr. **Ireland**. Yes.

Tom, my compliments to you for following this. I like the idea of a pro bono approach, I just am a little concerned that what we are doing is putting a kind of a Band-Aid on the problem—pro bono help—we are asking people to do something for nothing, and that isn't the way our society is set up.

It may be almost equally as ineffective as our great penchant over the last 20 years to throw tons of government money at problems. The real crux of it seems to me that we have a government that either doesn't have clear laws of what is right and wrong here, and when it does, it doesn't enforce them itself—it waits for the aggrieved person to spend his money enforcing the law.

Has anybody addressed, approaching the problem by saying from a legislative standpoint that it is illegal for these major chains to be selling something on which the patent has been infringed?

Mr. **Downey**. You need to have a finding of that.

Mr. **Garfinkel**. The principal problem is that how would you know whether Mr. Rasmussen was telling you the truth? Suppose you are AT&T and he comes to you and he complains, hey, that product is a knock off of mine. You need a finding under our system that, indeed, this patent has been violated.

Mr. **Downey**. And that would be true, Andy, even if AT&T wasn't going abroad to pick up the patent to sell it here. I mean, even if they suddenly decided to start selling Mr. Rasmussen's product here, the burden would still be on him to prove that.

Now, in the process—it has been a long time since I have taken patent copyright law—but you have remedy once you have the finding that will cover you both for legal costs and for damages. So it is not as though you can't be made whole. The process is that in the process of being made whole, you may be cut out before you get a chance to do that. You may not be able to do that.

Mr. **Garfinkel**. Let me just clarify that. Under International Trade Commission proceedings under section 337 there is no provision for damages or court costs. All you are entitled to get is a cease and desist order or some sort of embargo on the importation of that product.

If you are successful in proceeding in District Court which you can do in a parallel proceeding which, of course, takes four or five years in many instances, then you are entitled, if you are successful, to that kind of damage remedy.

The beauty of the ITC proceeding and the reason why so many people go that route is they get relief in a 1-year time period as prescribed by the statute.

Mr. **Bilbray**. And no damages?

Mr. **Garfinkel**. And no damage.

Mr. **Skelton**. Mr. Downey, thank you so much for being with us.

Mr. **Downey**. Let me apologize to the panel here for jumping in the middle of them.

Mr. **Skelton**. We are going to continue interrupting them—you are just the first today. Thank you so much.

Mr. **Downey**. Thank you.

Mr. **Skelton**. Barbara Kennelly, Congresswoman from the State of Connecticut. We welcome you for your participation.

TESTIMONY OF HON. BARBARA B. KENNELLY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CONNECTICUT

Mrs. **Kennelly**. Thank you, Chairman Skelton. I am Barbara Kennelly from the First District from the State of Connecticut.

Mr. Chairman, I would like to ask permission to place my entire prepared statement in the record.

Mr. **Skelton**. Without objection.

Mrs. **Kennelly**. Mr. Chairman, I am pleased to be here today to talk about small business access to remedies under our trade laws. You, and the members of your committee, are to be commended for focusing attention on the difficulties a small businessman or businesswoman has in trying to get relief under our unfair trade laws. I am particularly pleased that you have given time to H. Con. Res. 76 which expresses congressional support for a private sector offensive against the barriers to U.S. trade laws that our small businesses face.

Mr. Chairman, I am not going to go into my own statement in full because Mr. Downey is always eloquent and can express what we want to say so well, and I want to keep my statement short.

But I really think that you should—and I know you will—listen very carefully to some of the very best trade lawyers in town who have worked very hard to see this project come about.

Then you are going to hear, I understand, some absolutely incredibly, almost unbelievable stories, from witnesses who have lived through the experience of trying to pursue trade cases with limited resources.

Down the line you are going to hear from a witness who I am very pleased to see in this room, Mrs. Frances Shaine. Mrs. Shaine has a company called SPM Manufacturing Corporation, which is in Holyoke, MA, a town just over the border from my district in Connecticut. I see Frances on a regular basis—on the plane from Hartford to Washington. She is on that plane almost as much as I am on that plane because she is going back and forth to Washington trying to save the small photo album company she and her family run.

Frances Shaine and her family-owned company of roughly 350 employees, have joined with a few other domestic photo album makers fighting unfair practices by foreign photo album makers. To date, they have spent over $400,000 and 3 years on their battle. Worse still, in 1987 they are faced with another quarter of a million dollars in costs in their ongoing battle to prevent the end-running of our trade laws by other countries.

Other small companies do not have the initiative and the force and the drive of Frances Shaine. And as a result, if they are involved in something like this, they are just simply going to close their doors. I think this is tragic. And, it doesn't have to happen. The American business, legal, labor, and academic communities can work together to combat the barriers to our trade laws that these small businesses face by getting behind this effort to provide outreach services and necessary legal assistance to those small businesses who have found remedies to unfair trade practices beyond their reach.

I urge your support for this resolution.

Mr. Bilbray, I hear exactly what you are saying. Of course, this shouldn't happen. Mr. Ireland, you know it shouldn't happen, with your vast amount of experience in this whole area.

I don't think I have ever had a public meeting in my congressional district when someone doesn't come up to tell me that they have tried to deal in the international trade world. And the paperwork, and the complications, and the trade barriers that have been put up have made it almost impossible—and they are frustrated and they are upset.

We are in a whole new, difficult trade world, but we have the people in this country who want to make it work. This resolution will help small businesses here in the United States to deal with that trade world.

Thank you, Mr. Chairman.

[Mrs. Kennelly's statement may be found in the appendix.]

Mr. SKELTON. Thank you so much.

Questions for the gentlelady?

Mr. Bilbray?

Mr. BILBRAY. In this area, Representative Ireland and I seem to be on the same wavelength.

What about sanctions against those distributors? For example, stiff penalties like we did in the Immigration Act against distributors who knowingly distribute counterfeit, such as the ones that were distributed to us this morning.

We are not distributing—we are just looking at them.

I am trying to read section 301 while we are talking. But what about something like those penalties? We have to get to the source.

Mrs. KENNELLY. Mr. Bilbray, that is what I was trying to say. I am not arguing that this is an answer. This isn't going to be a cure-all for our small businesses in the international trading world.

I am just saying we are trying to learn to live in a new world where there isn't free trade, that we have an effort like this to just help keep those people who are involved in international trade, help them keep their heads above water until we do do what we probably should be doing.

Mr. BILBRAY. I was just looking at this bill and I was thinking about amending it to add the necessary language that would put some penalties in. It would be far less controversial than H.R. 3 and we might get it through.

Mrs. KENNELLY. Mr. Bilbray, since this is just a House Resolution, I don't know if that would be possible.

Mr. BILBRAY. The bill was drafted from the committee so that we could do something on this problem. I can't see leaving these people out there for the next two or three years going out of business while we try to think where we should go. That is what we did on the Immigration bill for so many years.

Mrs. KENNELLY. Mr. Bilbray. every time you say the Immigration bill, all I can think of, what is more complicated, our trade legislation or our immigration legislation? We are in a world of complications.

Mr. SKELTON. Thank you so much.

Mrs. KENNELLY. Thank you, Mr. Chairman, very much.

Mr. SKELTON. Appreciate your being with us today.

Mr. Gilman, a Member of Congress, also from New York, Mr. Benjamin Gilman.

TESTIMONY OF HON. BENJAMIN A. GILMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. GILMAN. Thank you, Mr. Chairman, and members of the committee.

I welcome the opportunity of going out of order in order to present a statement to the committee.

Mr. Chairman, I certainly appreciate the opportunity to testify before the Small Business Committee on legislation that I have cosponsored, and that is H.R. 1737, to try to help our small businesses respond to these unfair trade practices. I would also like to take this opportunity to commend and thank several members of our 92 Group, particularly the gentlelady from Connecticut, Mrs. Johnson; the gentlelady from Rhode Island, Miss Schneider, and particularly the gentleman from Pennsylvania, Mr. Ridge, for their leadership that they have demonstrated by introducing this measure and their efforts on behalf of small businesses.

Mr. Chairman and members of the committee, thus far our 100th Congress has been preoccupied with United States competitiveness. The focus of these efforts to improve competitiveness has been, though, on the larger corporations, despite the fact that our small business community, as you know, accounts for 60 percent of all of our United States jobs and about one-half of our GNP. I commend your leadership, Mr. Chairman, and the work of your Subcommittee on Exports, Tourism, and Special Problems in bringing small business concerns into the competitiveness debate. I am particularly pleased that you have included in today's hearing H.R. 1737 as part of your ongoing efforts to try to help our small businesses and improve U.S. competitiveness.

Over the last several years, I have been contacted in my own district by an increasing number of small businesses who have had difficulty and have suffered substantial expense in seeking a remedy with regard to unfair trade practices. The costs of a trade case can be as much as $500,000 for these small businesses, a sum far beyond the reach of many of these smaller firms. There is a predominant lack of knowledge among small businesses as to what remedies are available to them. And if they do know, they often have difficulty in obtaining the necessary documents to present a proper petition. Small businesses throughout our Nation are closing their doors due to unfair trade practices instead of going through the extensive problems of seeking a proper remedy.

H.R. 1737, I believe, is an important step in helping our small business community help itself, and in so doing, help our own Nation regain its competitive edge.

This bill, in establishing within the Small Business Administration a Small Business Trade Remedies Office on behalf of small businesses severely impacted by foreign imports and unfair trading practices, goes a long way in assisting our Nation's business community. The Office will be authorized to help our small businesses by preparing, initiating, and participating in proceedings to pursue appropriate remedies for unfair trade practices, a kind of guidance that the average small businessman truly needs.

This legislation also addresses the problem that small businesses have in collecting the necessary documentation to proceed with a proper petition. In circumstances where there is reason to believe a small business is impacted by unfair competition, the Small Business Trade Remedies Office would be empowered to collect the appropriate data necessary to continue injury proceedings.

The SBA would be asked to use existing funds to establish and operate that office, so there would be no additional cost to the Federal Government.

I might note that the U.S. Chamber of Commerce calls H.R. 1737 a promising initiative to a recognized problem, and the vast majority of our 92 Group members have cosponsored this measure. Moreover, this legislation sends a strong signal to the small business community that we, in the Congress, recognize and appreciate their important role in the economy, and that their needs must be addressed when we debate ways to try to improve U.S. competitiveness.

Accordingly, Mr. Chairman, I urge the committee to favorably consider this important measure, so that our small business community, as well as large corporations, have the opportunity to combat unfair competition.

I thank you for affording me the opportunity to appear before you.

Mr. **Skelton**. Mr. Gilman, we thank you so much for your interest and your work in this area.

Questions for Mr. Gilman?

[No response.]

Mr. **Skelton**. If not, thank you very much.

Mr. **Gilman**. Thank you.

Mr. **Skelton**. Mr. Ridge?

Mr. Ridge is recognized to testify. You are the principal sponsor of H.R. 1737.

TESTIMONY OF HON. THOMAS J. RIDGE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. RIDGE. Thank you, Mr. Chairman, very much. I want to apologize to the panel here for any inconvenience that my colleagues and I are causing you by delaying your testimony, and thank you very much for your indulgence.

Mr. Chairman, I want to thank you particularly for not only giving those of us who seek a more aggressive role for the government on behalf of small business through H.R. 1737, but really all your efforts in this direction on behalf of small business with regard to H.R. 3 and the leadership that you have demonstrated consistently on this committee on their behalf.

I don't want to take too much of your time but there are a couple of things I would like to highlight, and I would like to ask unanimous consent that my full statement be inserted as part of the record.

Mr. SKELTON. Without objection, your full statement will be so received.

Mr. RIDGE. Mr. Chairman, I need not tell you about the importance of small business, because a lot of the statistics that I have gleaned in support of this kind of initiative, I have taken from either committee reports from this subcommittee or other reports from the full committee.

We know that small business is responsible for about 60 percent of the jobs in this country, between 40 and 50 percent of the Gross National Product and comprises 98 percent of the businesses in the Commonwealth of Pennsylvania.

During the past couple of years when competitiveness has become an operative word or a buzz word in this town, small business has been really a dark horse in the race toward international competitiveness. Considering the number of employees that it serves, the number of communities for which it provides a very basic and stable economic base, and the work it does in promoting competitiveness, it should be the conerstone of our competitiveness plans.

I know that I am preaching to the choir because we took the information from a report from a small business community publication in which you reported that legal and economic analysis fees for international trade cases ran over $100 per hour; prosecution of typical antidumping and countervailing duty case cost a minimum of $150,000; more complicated market access cases under section 301 or unfair trade practices cases under section 337 can cost $250,000, and there are some that have gone up to a half a million dollars. I am preaching to the choir—you gentlemen know that.

If you take a look at the dumping law, the countervailing duty law, 201, 301, the myriad of laws that we have on the books to assist businesses and their employees, and ultimately their communities, in which they provide that stable economic base to respond to unfair trade practices from tough or foreign competitors, tough adversaries, we see clearly it is a very complicated maze and we understand it is a very costly one when you seek help and when you need help to work your way through it.

While I commend the effort and the resolution that deals with the creation of entities to provide pro bono services, I am not sure given the cost of these practices of promoting trade cases that you are going to find too many law firms or individual attorneys who are going to pro bono provide $150,000 or $500,000 worth of cases.

I also don't think you are going to find academic institutions or any combination of philanthropic efforts that will provide that kind of support for small businesses no matter how worthy the cause. Frankly, we have raised the expense—the expense is so high that it is very difficult for them to do so. That is why some of our Republican colleagues and I in the 92 Group, during a discussion, preliminary discussion, of H.R. 3 chose to devise a system where our Government, the United States Government, who—and all of us make it a point to include very laudatory comments about the role and the value of small businesses when we go home to talk to them. We decided not only to talk about their role and their value, but to try to create an almost ombudsman-like entity within the SBA to be their advocate, to be an aggressive advocate, to help these small businesses—98 percent of the businesses in Pennsylvania—when they are faced with unfair competition and must go through that tremendous maze of complex litigation to find redress.

I would like to highlight, if I might, a couple of the components of our legislation and respond to any questions you might have.

I am well aware that there is a Trade Remedies Assistance Center in the International Trade Commission. It is a well-intentioned effort. It elevates the awareness, I guess, of some people in this and other administrations that small businesses have a problem with unfair competition just like the multinationals do, and to them the consequences can be as severe or even more severe.

But, frankly, they don't have a separate budget over there. I think they recorded last year that they used—if you aggregated all the hours, a person and a half for the entire year. Frankly, if a small business came to them for some assistance all they really did was hand out some forms, tell them about guidelines, and perhaps give them a glossary of attorneys or counsels available in town to help them do it.

Again, it is good that somebody is thinking about small business but, it is clear that that is not aggressive enough. It had no authority to provide advocacy service, and that is what small business needs. They want somebody in the government fighting on behalf of small business. That is going to put a lot of pressure on the folks at SBA. There may be more cases than they want to deal with and they are going to have to come up with some kind of a screening mechanism so that those that undertake, those that use taxpayers' dollars will have maximum effect, not for that particular entity, but for a broader group that either are affected by it or potentially could be affected by it.

But again, I want to underscore the fact that it is good to have that Trade Remedies Assistance Center at the ITC. But, since 1984, it has been very, very ineffective.

There is some legitimate disagreement as to where we would put this Small Business Trade Remedies Office within the SBA. In our legislation we have suggested that it go into the Advocacy Office.

Others think it might be more appropriate under the International Trade Office. I would just like to tell you why we thought we should put it under the Chief Counsel for Advocacy.

By definition, that counsel is the primary advocate for small business—by definition—that is his job. And by definition and by job description, he promotes the position of small business with Federal agencies, maintains liaison with trade and professional organizations, and serves as the major source of information about the government for small business.

The Chief Counsel in this office retains the authority to participate in investigations, hearings, or other proceedings pending before departments and agencies to facilitate small business participation in trade remedies proceedings.

So it seems to me under the regulatory guideline that already exists, this would be the place to put it.

The function of the Office of International Trade, by definition, is more in the area of export promotion. The component that we are looking for is someone who has the authority to go out and aggressively pursue trade remedies on behalf of small businesses.

Finally, I would tell you that one of the perhaps more controversial matters was to develop a more aggressive posture on behalf of small business, and still keep the bill revenue neutral.

We tried to come up with something that said, look, we understand what the deficit is all about, you can't go out there creating new bureaucracies and expanding powers. We tried to make it revenue neutral.

There may be some legitimate concern that this advocate or ombudsman cannot survive or do the job that we want it to do without some additional funding. At best, I think it would be modest and, hopefully, would not be a stumbling block to creating this kind of entity within that institutional framework.

Clearly, I am not married, nor is anyone that sponsors this bill to my knowledge, married to having it under the Chief Counsel's Office and the Advocacy Office. If you would decide with your expertise that the role can be better provided and small business can be better served under the International Trade Office, so be it.

Again, I want to thank you, not only for your interest in this particular legislation but for your help and assistance on behalf of small business throughout the years.

This is not a sense of the Congress. We want to set up a real meaningful, aggressive advocate, ombudsman-like advocate in the SBA Office to help out these people about whom we say so much, but to this point have done little in terms of helping them with unfair trade practices and remedies.

I thank you very much for your indulgence.

Mr. SKELTON. Mr. Ridge, we thank you so much for your excellent testimony today.

Mr. Ireland.

Mr. IRELAND. Thank you, Mr. Chairman.

I think you are on the right track. We need something that has got some teeth in it. You are right when you say there is a lot of talk around this country about how wonderful small business is. Even in Congress there is a lot of talk about how wonderful it is. Then when the chips are down, our colleagues, for the most part, scatter to the four winds supporting big government, big labor, big business, leaving small businesses without help. It seems to me that you are going to the heart of what the problem here is—the competition is tough overseas and there are all kinds of non-tariff barriers, as well as tariff barriers.

Our real problem here is with our own government. Yes, there are inequities abroad, but our small businessman is covered up with red tape, long delays in the process, and our own government tripping over itself. As far as I am concerned, your legislation goes to the heart of that problem and tries to clear it up by making a place within our government that can really get something done.

I have to say that I support your view that within SBA it ought to be in the Advocate's Office.

I compliment you and your many associates for putting it together, Tom, and count me in.

Mr. RIDGE. I appreciate it. If I might make one observation again—I leave it to the committee's expertise and the testimony, and the comments, and criticisms that we may get—I really feel strongly about the capacity within the government for an entity or an individual to initiate the petition, to present the petition, and to move it through the system.

When it comes to dumping and countervailing duties, you have got the ITC determining material injury after the Department of Commerce makes the determination as to whether there is any dumping or CBD, so you really can't put it in the ITC's office, and we really have to do more than just hand out some files and tell people about deadlines.

It would probably be unusual—I can't think offhand if there is another area where the government would actually place the responsibility to shepherd through the rest of the government a petition of this sort to promote small business, but I think if we are going to break the ice and have an initiative, that certainly small business deserves that opportunity.

Mr. IRELAND. The foreign dumper, the foreign copier—they don't have to worry about handling their business in America; our own government handles it for them—and it is our bureaucracy that helps. They have got it made.

Thank you.

Mr. SKELTON. Thank you.

Other questions?

Mr. Bilbray? Mr. Lancaster?

[No response.]

Mr. SKELTON. Mrs. Meyers?

Mrs. MEYERS. Again, not so much a question as a comment, I am cosponsor of Mr. Ridge's bill and I think that small businesses are extremely important and a vital factor in my district as it is in all of our districts, I am sure. Because they are such a large percentage of business and they do a very small percentage of the export-import, I do think it is important to encourage them. I think we address that to a certain extent in the Trade bill.

I also think it is extremely important that we give them some opportunity for trade remedy relief. And, of course, that is what this bill addresses.

At this point, I am concerned, Mr. Chairman, about the Trade bill and I think it is important that we address this issue separately. What we did in the Trade bill was important—if it makes it all the way through the process, and is signed into law. I think it is going to, and I hope it does. But I do think that it is important that we address this issue separately.

The bill would provide some assistance in preparing the petition, and that is the extremely expensive part of the process. I am glad this committee is considering the bill today.

Mr. SKELTON. Thank you.

Mr. BILBRAY. Mr. Chairman?

Mr. SKELTON. Mr. Bilbray?

Mr. BILBRAY. I don't know if you heard the earlier testimony, but it was brought up this bill really is a step in the right direction, as you stated. But I feel that we should go even further.

Mr. Ireland was the one that brought it up originally. He discussed the concept of penalizing the distributor for knowingly distributing counterfeit items. The gentleman to your side showed us the two items that you may have seen already, which, to me, are shocking, and everybody else that has looked at it are shocked.

I have proposed to staff, amending your bill to provide two things, which they would take out of our jurisdiction by going over to Judiciary and going to the Trade Committee, and Ways and Means. To provide (1) that funding for an expanded Office of Advocacy in this situation be established so we can really get some help for these people.

Second, provide punitive and actual damages, triple actual damages, to American small businessmen or manufacturers who are infringed on.

Third, stronger criminal penalties for distributors who knowingly distribute counterfeit items on the market. Because in this particular case, obviously, the guy knew he was handling counterfeit and patent violation articles.

Would your group have any objection to us expanding it, or would you rather us go with a new bill?

Mr. RIDGE. I appreciate the observation and the constructive add-on. As far as I am concerned, anything that you do in terms of penalties is a worthwhile contribution and a necessary contribution to the whole debate over competitiveness and to unfair trade practices.

By design we chose to limit, we think, the focus of the bill to this committee to keep the jurisdiction within this committee because candidly looking at perhaps what Ways and Means might do to this portion of the bill or to an expanded bill that amended some existing trade laws, it might never be reported out. And that was a really grave concern of ours.

When we consider making changes that may or may not affect the general agreement on tariffs and trade and existing 201, 301, countervailing duty, and the dumping statutes, we think it could tie us up in another committee that may not be as sympathetic as I would like them to be, and for that reason we chose in this particular instance to try to limit the jurisdiction to this committee alone.

I am sure this group—and I hesitate to speak for any single other colleague, but I know most of the people who are interested in this legislation wish we would get a lot tougher with regard to penalties as well. For that reason, we chose to try to limit the jurisdiction to this committee.

Mr. Bilbray. All right, thank you.

Mr. Skelton. Thank you.

Other questions?

[No response.]

Mr. Skelton. If not, we do appreciate, Mr. Ridge, your excellent testimony today. Thank you.

Mr. Ridge. Thank you.

Mr. Skelton. Now, as the fellow says, where were we?

Your name is Mr. Garfinkel?

Mr. Garfinkel. That is right.

Mr. Skelton. All right, you are on.

Mr. Garfinkel. Mr. Chairman, thank you for the opportunity to testify today.

I would ask that my testimony in written form be submitted for the record.

Mr. Skelton. Without objection.

Mr. Garfinkel. My testimony is about the pro bono legal fund effort which began about a year ago. I can say there has been a good bit of interest in doing something like this within the trade bar and within the business community.

My interest in this began when I was an attorney-adviser in the USTR's office and later when I was at the White House as Deputy Assistant Director for Commerce and Trade, and then later when I joined a private law firm here in Washington where I have been practicing now for four years.

In all of these capacities I have witnessed the escalation in recent years in both complexity and cost of bringing trade proceedings under the trade remedy laws.

The escalation began with the passage of the Trade Agreements Act of 1979, which set up a more judicatory process for filing trade cases. We now have interlocutory appeals, and protective orders, and discovery. It has become much like a courtroom proceeding. This has really been the reason why costs in these cases have gone up so dramatically.

Now, while the 1979 act was beneficial in terms of assuring more consistent decisions, it has really shut out a lot of people from accessing those laws. And as has been discussed this morning, the cost of bringing these cases ranges in six figures in almost all instances.

This has, as mentioned, had an effect, I believe, on U.S. competitiveness. I think small businesses are vital to our ability to exploit technologies; big companies today simply can't do it in all instances. And if we don't provide access for small businesses to our trade laws, we are making a grave mistake.

Together with some other former government officials and trade attorneys, as I mentioned, we decided that it would be worthwhile to organize a private sector pro bono effort. Some people were skeptical. How could you possibly get anybody to do anything for free in this country?

The fact is that there are a lot of lawyers out there that are eager not only to get involved in the international trade area, but to take on some challenging cases, and they are prepared to put in pro bono time in the same way it has been done in the environmental area. Competitiveness has become——

Mr. **Skelton**. I might interrupt you, for the first years of the practice of law in Missouri, the people accused of crime were represented by people appointed by the court and it was free and any expenses came out of their own pocket. Now, this has only changed in recent years. So it is still the same advocacy pride that is found in the profession.

Mr. **Garfinkel**. It seems to me that saving small businesses in this country that are being ravaged by unfair imports and restoring American competitiveness is as lofty an objective as preserving our environment. It occurred to me that there was no reason why we shouldn't have pro bono efforts to help American industry. There are a lot of lawyers in this town and across the country agree with that view.

Conceptually, what we have tried to do is establish something that would involve a minimal amount of cost. We are not interested in obtaining government money to litigate these cases. The concept is to establish a 501(c)(3) nonprofit organization which would rely on contributions from foundations and other private sector groups, and the time of attorneys who would be involved in these activities.

Under 501(c)(3) we would, frankly, be barred from accepting any kind of fee from a client. We could accept reimbursement for our out-of-pocket expenses, filing fees, and the like.

And after sitting down with enough lawyers in the trade community, I was satisfied, and others involved were satisfied, that there was a sufficient number of folks out there that were prepared to put some time in. We talked with some of the law schools which wanted to circulate some clerks through our organization. We had some economists that were prepared to put time in.

Part of the reason why we were very pleased to get the endorsement of this concept by so many Members of Congress was our goal to try to create some interest in this, so that when we do begin to approach corporations and foundations for money, there would be a sense of Congress behind our effort.

We felt that congressional endorsement, even in an informal sense, would help us in raising money.

The Fund is not the answer to all the problems that have been raised this morning; it is only a small part of the puzzle. Our goal would not be to take every case that came along that couldn't be prosecuted.

Our goal would be to select five, six, seven good cases a year where we might have an impact on U.S. competitiveness; where we might set a precedent by opening up a market that others could follow into.

And our goal would be to focus specifically on unfair trade practice cases. We are not interested in taking cases which involve fair trade, but nevertheless, impacts on small businesses. The so-called 201 type case, for example, would not be of interest to us. But we would focus on dumping, countervail, 301, 337, which I think are the principal avenues for addressing unfair trade practice problems.

Our means of proceeding on behalf of clients would be the same as any lawyer would pursue. We would file petitions. We would go to the Hill. We would come up here to try to get some interest in the problems of our client. We would go to USTR. We would do whatever it takes to get the foreign producer or government to stop the unfair trade practice in every instance.

The criteria that we would apply in deciding whether or not to accept the cases I mentioned would cover issues such as whether or not we are talking about an important legal precedent and competitiveness and so forth. But in no instance would we take a case where we felt that the client had the resources to hire private counsel. Nobody is interested in taking business away from lawyers in this town who are prepared to do this kind of work.

So the only kind of case we would take is flat out where a petitioner says, look, I am not going to bring this case unless somebody takes it for free. We would look very closely at his tax returns, his operating profits, what he has got in the bank, and everything else before we made that determination.

Let me, if I could, just comment on Mr. Ridge's proposal briefly. I think that the role of trade advocacy offices and trade remedy assistance offices would augment what we are trying to do. I don't see any inconsistency.

I think there is a problem with setting up an office within SBA that might ultimately end up taking a position on a trade issue that is different than that taken by the USTR. It is very important that the United States speak with one voice on trade policy.

I can see a situation where you would have a petition filed where SBA becomes the advocate on behalf of that petitioner and the USTR, after reviewing all the facts, decides this is a fine petition but under our international obligations there is no basis upon which we can take retaliatory measures or even insist that the other government disengage its activities.

We are governed by certain international agreements, including the GATT, which circumscribe to some degree what actions USTR can and cannot take.

Under those circumstances, if SBA continued to prosecute the case, or appeal the USTR decision, and went forward to the Court of International Trade or the Court of Claims, we would have a real problem. We would have SBA taking a position very different from the policy position taken by USTR. I think it would be confusing and undermine, to some degree, our trade policy objectives.

One solution to that problem might be to only have the Advocacy Office take a proceeding forward to the point where there is a decision made by the USTR, the Commerce Department, or the ITC.

If the ITC or USTR rejects the petitioner's complaints and finds that there is no basis for retaliation or action under U.S. law, then I think it would be best for SBA to stop so as to avoid a potential conflict with our trade policy objectives.

Thank you, Mr. Chairman.

Mr. SKELTON. Thank you so much.

[Mr. Garfinkel's statement may be found in the appendix.

Mr. SKELTON. Mr. Don deKieffer.

TESTIMONY OF DON deKIEFFER, ATTORNEY, LAW FIRM OF PILLSBURY, MADISON & SUTRO, WASHINGTON, DC

Mr. deKieffer. Thank you very much, Mr. Chairman.

Mr. Chairman, I am a trade attorney. I have been practicing in this area for about 20 years, most recently with Pillsbury, Madison & Sutro. Prior to that I was the General Counsel to the U.S. Trade Representative. And before that I had probably brought about 25 or 30 of these cases, almost all of which were brought on behalf of American manufacturers, some of them small businesses.

I have been involved in section 201 cases, section 337, antidumping, countervailing duty, section 301. I guess I have done about 25 or 30 of them; probably not very many folks in town have done more.

I know that there is a lot of skepticism about the idea of pro bono legal services for small business in this area. But like Mr. Garfinkel, my firm and I are prepared to work in this area to help small businesses.

Prior to 1979, as Eric Garfinkel pointed out, you could bring in cases relatively cheaply. But there was absolutely no certainty as to how you would come out. There were no real legal protections if you brought a dumping case—it was totally discretionary and arbitrary.

I think the Congress was responsible in passing the 1979 act and subsequent amendments so there is some certainty and some protections to not only small business, but all businesses when they complained about unfair trade practices.

But what has also happened is that the costs have gone through the roof, because every time you create a new legal right, you also create costs. Right now the way the trade cases are going is that you can get all the justice money can buy. And, frankly, that is one thing for Fortune 500 companies; it is quite another for small businesses. And ironically, one of the tests that the Congress has imposed upon any petitioner is that he must demonstrate he has been injured before he can get relief in antidumping and countervailing duty cases until right now, in section 337 cases as well.

Ironically, the people who can best prove that they are injured are the ones that are the least able to afford to go forward with a case.

One of the elements of injury is that they have lost their business, that they can't afford to even stay in business anymore. These are the very people that have the best cases.

If you have lots of money and you are not losing anything you don't have a good case. You could afford the lawyers. So it is an upside down problem.

Why is it that lawyers like Mr. Garfinkel and me would be very willing to get involved in these things? I think, Mr. Chairman, you pointed it out: The profession of the practice of law is an honorable one. Many lawyers practice in the environmental areas, many do it voluntarily for indigents.

As far as I am concerned, using the skills that I have been able to develop over 20 years to help people who simply cannot afford it but who may have extraordinarily good cases as you have written these laws is as honorable an undertaking as any of the other pro bono kinds of activities that other attorneys take on.

I would like to focus just for a moment on some of the issues that Mr. Garfinkel pointed out with regard to Federal funding of having prosecutors actually be government employees in filing cases. It is not only with the USTR that you could have problems. And many, if not most, countervailing duty cases now wind up in the Court of International Trade in New York. Almost invariably the U.S. Government is the defendant in those cases. In other words, the losing side—let's say the petitioner doesn't get all the relief that he thought that he deserved or there are technical problems—he has to sue the U.S. Government, not the foreigner in the CIT. Who defends the United States? The Department of Justice.

It would be ironic, to say the least, if you had on one side of the room the SBA saying the U.S. Government doesn't know what it is talking about, and another U.S. Government employee sitting at the other side of the courtroom saying this guy from the SBA is all wet, the U.S. Government knows exactly what it is doing.

You have attorneys from the U.S. Government on opposite sides of the room spending taxpayers' money simultaneously to argue these cases.

It is a little bit different at the agency level where theoretically, at least, the agency is supposed to be neutral, at least the Commerce Department and the International Trade Commission.

But on appeal where the real guts of these cases is sometimes decided at the Court of International Trade, or the Court of Appeals for the Federal Circuit, that is where some of the very difficult decisions are made.

I can also envision a case where a small business importer, who was importing some knocked off product or some dumped product, would go to the Small Business Administration and say, "I am a small business, I want the U.S. Government to defend my actions in importing knocked off goods." I have got a good case—I think we can beat these guys.

I can even imagine a more bizarre case of two small businesses going in; one who holds a patent and one who claims that he isn't infringing the patent. He is bringing in products from overseas that may or may not be for any debts what is at issue here. How is that going to be resolved?

I am concerned—not that this is some kind of technical bugaboo, but lawyers tend to think this way—what happensd if there are constitutional challenges brought just on those grounds and the whole doggone thing blows up? Then small business is worse than where it started out.

I only suggest this not to imply that the bill is ill motivated. I just think that it needs some more technical work before you finally vote.

In the meantime, I want to assure you that the trade bar, including my firm, and I know Mr. Garfinkel's firm, and many others, are prepared to donate our time to help people who can't help themselves.

Thank you very much.

Mr. SKELTON. Thank you.

Are there questions of the panel?

Mr. Bilbray?

Mr. Bilbray. Yes, a couple. One, of course, on your concept of one group of Federal employees adversarial against another group. If that concept had been taken a long time ago we wouldn't have a Federal public defender's office either, which openly fight each other and, of course, where there are conflicts the court then could ask for an outside attorney to come in and represent a third party when you have three different problems.

You have heard some of the discussions earlier, you have been here through all of it. It just seems to me, we should go with the concept that the pro bono bar suggests.

The third thing is the penalties against the importer. This is the concept that I have been advocating. I think Mr. Ireland brought it up earlier?

Mr. deKieffer. The importer or the distributor?

Mr. Bilbray. The distributor.

Mr. deKieffer. Right now there are penalties against importers performing certain types of activities—337 keeps the products out. If it is the distributor, though, the law currently allows people whose products have been infringed, to go after them in court under the Lanham Act and several others.

Mr. Bilbray. I think you only could get penalties at the second stage. What about penalties at the first stage and second? How about punitive damages, triple damages, and things like that?

Mr. deKieffer. There have been several suggestions that have been raised with regard to putting damages not only in section 337 cases but also in antidumping and countervailing duty cases.

One of the suggestions that has been around for about 10 years is to ask the Customs Service to segregate the money that they currently collect in antidumping and countervailing duty cases and put that into a fund to compensate companies, particularly small businesses who bring these cases.

Why shouldn't people who engage in unfair trade practices cases pay for it? The problem is that the Customs Service for years has contended that there is no way that it can tell how much of the duties it collects are penalty duties. I find that astonishing but that has been the testimony for the last 20 years for every Commissioner of Customs that I am familiar with—they say, "Gosh, we really don't know. You know, ask us next year when we get our computer."

But with regard to damages, there are certain provisions for damages that are currently pending on the Hill.

Mr. Garfinkel. But the Specter amendment over on the Senate side was voted on, I guess, last week, and defeated narrowly. But that provision would have provided for punitive damages in antidumping cases.

I agree that, indeed, we need a greater deterrent. Now, most foreigners when they dump, never really pay much in the way of antidumping duties. They just raise their prices and avoid paying any dumping duties at all. It is really a slap on the wrist. And at some point we need to take a look at our trade laws and see what we can do to increase the deterrent.

I think we also need to look at the complexity of our laws and the real answer to the problem we are talking about today is trying to do something to simplify those laws so that we have a better system that is more accessible to our companies.

Mr. SKELTON. Other questions?

Mr. Ireland?

Mr. IRELAND. Thank you, Mr. Chairman.

I particularly like your last statement and I recall our discussion some time ago as you got started on this. I am glad to see that it has come to this point, and I certainly feel there is a place for House Concurrent Resolution 76 and certainly your efforts.

What the real problem is with these laws is something that we all ought to be focusing on. Mr. deKieffer has pointed out the very real problem. You have got the sense of what I think the rest of the American people would think was a pretty silly approach to things—that you have got to prove that you are injured. And the only way you can prove that you are injured enough is to be practically out of business and then you can't afford to do anything about it.

I perked up at your comments about the Office of Advocacy and the Small Business Administration, if we had H.R. 1737 passed, we would have to bow to the USTR's office in some sort of conflict. I am not convinced the USTR is always right.

I can remember in a dumping case with Mexican tomatoes when a very rural Florida tomato grower looked at the people from the State Department and the USTR's office and said, "I know what the problem is, we need an American desk at the State Department." I think that that is very, very true.

The SBA Office of Advocacy is really there for similar things throughout our government and the Advocate operates a number of activities, not the least of which is oversight of the Regulatory Flexibility Act.

You have both pointed out, the foreigner doesn't have to worry about defending himself. The American businessman can't get at the foreigner that has aggrieved him; he has got to fight his own government.

I would end by saying I like what you are doing. I think that the resolution ought to be passed to help you in any way we can. But I do think that we need to get to the heart of the matter and certainly your efforts will help us somewhat.

Mr. GARFINKEL. Thank you.

Mr. IRELAND. Thank you.

Thank you, Mr. Chairman.

Mr. SKELTON. Mrs. Meyers?

Mrs. MEYERS. No further comment, Mr. Chairman. Thank you for letting me sit with the subcommittee today because it is a subject of great interest to me and I have learned from being here.

Mr. SKELTON. Pleased to have you.

Mr. Slaughter?

Mr. SLAUGHTER. Mr. Chairman, I agree with your remarks and those of my colleague Mr. Ireland. I think that this is a problem where a legislative remedy would be of some help and I think that we should try to come up with the best bill we can to do something effective in this area.

Mr. SKELTON. Thank you.

Thank you very much. We appreciate this panel's efforts and advice. We go from here to the Honorable Jake Pickle, Member of Congress from Texas, who is well versed in the matters of trade.

Mr. BILBRAY. Mr. Chairman?

Mr. SKELTON. Yes.

Mr. BILBRAY. I would say one thing. I hope that pro bono attorneys will help first our gentleman from the Crest Industries and in this case with Taiwan.

Mr. SKELTON. They have a case right now, don't they?

Mr. BILBRAY. Right.

Mr. SKELTON. Thank you.

TESTIMONY OF HON. J.J. PICKLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. PICKLE. Mr. Chairman, I appreciate the courtesy of the committee to allow me to testify. I am sorry I am a few minutes late but I was testifying before another committee. You are very courteous to allow me to come in at this point.

I am here to ask the committee to approve a resolution, H. Con. Res. 76, which I have introduced along with Congressman Downey, Congresswoman Kennelly, and Congressmen Frenzel, Archer, and Matsui—all on the Ways and Means Committee.

H. Con. Res. 76 proposes the establishment of a private, independent organization to assist small businesses in taking advantage of our trade laws.

Mr. Chairman, I am going to ask that my statement be included in the record. Let me just simply summarize.

Mr. SKELTON. Yes, without objection.

Mr. PICKLE. I became acquainted with this problem more acutely about a year ago when one of the businesses in my district informed me of the difficulties they were having with unfair foreign competition: The duplication of their products, lack of access to foreign markets, and uncontrolled counterfeit imports.

This firm has protested and has gone to court, and four times the courts have ruled in their favor that they were being unfairly imposed upon. It has cost the firm about $800,000. My firm in Austin has gone from some 28 to 30 employees down to only about 5 now.

It is a terrible imposition on them. Now, what is happening to that company—Nova Technologies, from whom you will hear in a minute—is happening across this land, and we ought to do something about it.

So my resolution simply says that it is the intent of the Congress to establish this independent organization to allow contributions from business, that is corporate America, from labor, from the academic community, and from the legal community, to make their pro bono contributions and give free, legal services to a lot of small businesses. We need it. They face unfair competition.

Now, the Trade Subcommittee has tried to address some of these things. House bill No. 3 does have strict prohibitions against dumping practices or proposes mandatory retaliation in many cases. But still the legal expenses or the inability to just know how to proceed still exists with the small business entrepreneur. So we need this help. I am just simply saying this is one good way to go about it.

Now, House bill No. 3 has language in the report that says we should establish such an organization and that we encourage these various groups I have mentioned to come together and pool their resources to help small business, so that they could at least have a chance to trade internationally and fight against the unfair competition and the counterfeiting practices. That is what this resolution attempts to do. It does not cost any money. We hope contributions will be coming from these communities I have mentioned. The people you have just heard from have already volunteered their services to establish such an organization.

The Members of Congress, particularly on the Ways and Means Committee, recognize this is a serious matter for small businesses. We are just asking you to advance this measure as quickly as possible because it is in the public interest that we help small businesses, particularly when it doesn't cost the government.

We believe that business is saying to us: Your support for such an organization will give us encouragement and impetus to seek contributions and we can then move forward.

Three or four of your members—I think Mr. Bilbray, Mr. Lancaster, and one other, have already cosponsored this measure, so I believe it has strong appeal. I hope that the committee can look at it favorably.

I might add in passing that the bill has received favorable consideration—well, it has been introduced in the Senate by Senator Heinz, and I am told that it will be advancing quickly. So I hope your committee can see the advisability of advancing this legislation.

I would be pleased to answer any questions that any members of the committee might have.

[Mr. Pickle's statement may be found in the appendix.]

Mr. SKELTON. Thank you so much, Mr. Pickle, for being with us. Andy?

Mr. IRELAND. I have no questions, just thank you for coming, Mr. Pickle, it is good to see you.

Mr. PICKLE. Thank you, Mr. Ireland.

Mr. SKELTON. Any questions of the distinguished gentleman from Texas?

[No response.]

Mr. SKELTON. If not, we do thank you so much.

Mr. PICKLE. We thank you for your consideration.

Mr. SKELTON. Panel number 2: Frances Shaine, Mark Greenbury, Leo McDonough, and Robert R. Austin.

Regarding the representative of the Smaller Manufacturers Council, is Leo McDonough here?

Mr. MCDONOUGH. Yes, sir.

Mr. SKELTON. You are the one that is representing them, I am correct then.

Frances Shaine, please.

TESTIMONY OF FRANCES SHAINE, CHAIRMAN, SPM MANUFACTURING CORPORATION, HOLYOKE, MA

Ms. SHAINE. Thank you, and thank you for having us here.

My name is Frances Shaine. I am Chairman of the Board of SPM Manufacturing Corporation in Holyoke, MA. I am a resident of New Hampshire and a graduate of Wellesley College. I serve on the Board of the U.S. Chamber of Commerce, and I am Chairman of the Council of Small Business of the Chamber. But today I am speaking as Chairman of SPM, my family's corporation.

We are one of the few remaining manufacturers of photo albums in the United States. We are a family-owned company, owned and managed by our family since 1922. It is administered by me, my husband, who is its president; our older son, who supervises production; and our daughter and younger son who are active directors. We employ between 300 and 500 people, depending on the season.

We are a company whose market share increased dramatically in the years 1980 to 1983, after a period of quiescence under the management of other members of our family. We are a company which invests and reinvests what is to us very large sums of money to insure the efficient and automated production of photo albums at honest and competitive prices.

We are a company which searches world markets to assure ourselves of lowest possible cost for raw materials. We are a company which markets and sells knowledgeably and professionally. We are a company where management and worker alike work very hard in the sure knowledge that this is required if we are to provide a quality product competitively priced.

My company is representative of all small companies in this Nation which are oppressed by unfair foreign competition.

Protectionism is not the issue. Unfair competition—in our case, dumping and subsequently transshipment—is against the law.

But our government does not act to defend its borders from this onslaught. It relies on the efforts, expense, and argument of industry, even very small industry, to fight the battle. This is one area in which the government has successfully privatized the process.

In fact, an industry which identifies an unfair practice very often finds itself fighting two countries—ours and theirs, as Congressman Ireland has indicated.

The burden of proof is on the domestic manufacturer. It supplies facts and arguments; it pays lawyers a lot of money. The foreign companies, in our experience, are well supported by their country. Our battle is against a group of very small Korean companies, who consistently plead their inability to provide good accounting records. Nevertheless, the Korean government hired high-priced Washington counsel, economic experts, and a U.S. Big Eight accounting firm.

We have learned more about trade law than we ever wished to know.

We have spent hundreds of thousands of dollars, and we have been proved right.

But there is no change in the marketplace environment.

In 1984, our industry experienced a dramatic decrease in price due to intense price competition from foreign manufacturers. Analysis of the prices at which Korean and Hong Kong merchandise were being sold in this country brought us to the inescapable conclusion that classic dumping was under way: Products were being sold in the United States at prices we knew to be well under fair value.

We successfully proved the merits of our case before the International Trade Commission and the Department of Commerce through an industry-initiated antidumping petition. The petition process takes about one year, by statute. So, we effectively were badly damaged during 1984, due to dumping. The dumping continued during 1985, while we followed the process.

During the process the Commerce Department unquestioningly relied on information from the foreign companies in making its preliminary determinations. During 1985, this resulted in exceedingly low duties of less than 14 percent being imposed on Korea, effectively denying the U.S. industry relief from the unfair import practices during that market year.

We knew that the information on which the Commerce Department relied in the case of Korea was wrong, but they refused to believe it. In fact, the Commerce Department subsequently was unable to verify the Korean figures they had used. So, in its final determination, the Department imposed a 64.8-percent duty on Korean photo album imports, and a far lower tariff on Hong Kong albums. Korea appealed, and also immediately asked for an expedited review of the tariffs. The review was denied—with great effort from us as well—but the Korean appeal is still under way, 18 months later.

Yes, a 64.8-percent dumping duty was imposed on Korean photo albums in December 1985. After a year-long struggle, the beginning of 1986 found the domestic photo album industry optimistic. Although the industry incurred direct legal bills of about $225,000, plus at least $150,000 worth of other expenses during that year, and although our relief was very late in coming, we naively believed that the tariff imposed on Korea promised us a chance to compete fairly and an opportunity to begin to recoup the losses we had incurred over the previous two years. We thought we could at last turn our focus again to doing what we do best, manufacturing and selling photo albums.

Instead, 1986 brought us a new nightmare: Massive circumvention of the Commerce Department's order by Korean transshipping of millions of photo albums, photo album filler pages and binders through Taiwan, Singapore, Hong Kong, Malaysia, and perhaps other countries. U.S. Government statistics show that this transshipment began immediately upon the imposition of the antidumping duty. Many of these albums enter the United States duty-free under the GSP system, costing the United States a lot of money and lost revenue from tariffs. Almost all were marketed at the same "dumped" prices we had experienced before the dumping order.

So, 1986 found us battling on another front, this time before U.S. Customs, competing with the drug trade, steel, textiles, and other large industries for the scarce resources, time, and personal effort, available from Customs for detection of customs fraud, in an effort to convince Customs that sufficient evidence existed to initiate fraud investigations.

In December 1986, almost one year after the imposition of the final dumping duty, MBI, a dominant importer of photo albums from Korea, pleaded guilty to attempting to import photo albums with magnetic pages as Taiwanese when those albums contained components of Korean origin that were transshipped from Korea to Taiwan by the defendant for the purpose of avoiding payment of antidumping duties.

This is the tip of the iceberg. The incredible and enormous shifts in exports from Korea to non-traditional photo album export markets in 1986 tell the story. A recent article in the Korean Herald reported an overall increase in photo album exports in 1986 of 69 percent—that is after the antidumping duty—although the United States is by far the largest photo album market in the world.

A comparison of photo album exports from Korea in the 10 months before and after the Commerce Department's final antidumping determination reveals—listen to this—a 121,000-percent increase in exports from Korea to Taiwan, a 1,328-percent increase in exports to Singapore, and a 904-percent increase in exports to Hong Kong.

Dramatically, for the United States, imports from Taiwan, Singapore, and Hong Kong in the first five months of 1986, following the antidumping order against Korea, experienced increases of 1300 percent, 860 percent, and 95 percent, respectively, over the same five-month period. It is not a coincidence.

If those three countries which had the huge import increase were really to have been absorbing the photo albums, the level of consumption in Taiwan would have had to be one album for every man, woman and child; two in Hong Kong, and 10 in Singapore. Unlikely!

These increases are not explained by increases in capacity. Capacity increases of this magnitude cannot and did not take place in a few months' time; no company or companies could have been operating with excess capacity on the scale indicated by the dramatic increases in imports from Taiwan, Singapore, and Hong Kong.

This is an industry we know. We have been inside most of the factories in the Orient. We know that enough capacity did not exist in those three countries to produce photo albums on the scale required by recent import increases from these countries.

Thus, instead of the hoped-for opportunity to recover and compete, 1986 brought the expenditure of another $100,000 in legal fees, and the unimpeded flood of Korean imports being transshipped through third countries, and entering the United States at the same low prices as before.

It is now nearly 1½ years after the final antidumping order and almost three years since we began our efforts to combat these unfair practices. The problems are bigger than ever and relief is nowhere in sight. The industry is now faced with a so-called "annual review" of the 1985 decision by the Commerce Department, a decision which has yet to bring any relief to the industry. We are still working with the Customs Department in an effort to stem the massive circumvention of the antidumping order. But even when scarce Customs resources can be found to focus on the problem, the foreign companies engaged in fraud are numerous, and each investigation takes valuable time.

The problem continues.

We are still taking phone calls from our salesmen asking us to meet competition on one more dumped price from an importer in an effort to retain our customers.

Mr. SKELTON. Say that again.

Ms. SHAINE. I said that we are still taking phone calls from our salesmen asking us to meet competition on one more dumped price from an importer in an effort to retain our customers. That is, our customers get very low prices from dumped merchandise.

We are full of many unanswered questions. Legal battles proliferate, although victories do not bring the hoped-for relief. Every day brings new tales of attempts at circumventing the original antidumping order and new onslaughts on the customers we have retained. Yet, by the end of this year our industry will have spent more than half a million dollars in legal fees over a three-year period. For any business, that is a considerable sum. For a small industry suffering from unfair trade practices, it represents a desperate attempt to survive. We are determined to continue to fight and we are determined to survive.

When we started this process, there were four photo album companies in this Nation. One no longer produces photo albums, one is no longer able to contribute to the legal expenses because of the effects of all of this on their case, so there are now two of us paying the bills.

We are confident of our ability to compete successfully in a fair marketplace.

We find ourselves wondering whether, despite the proven merits of our case, the opportunity will ever come.

We do not believe we are unique. We think we are at the threshold of this effort. That is, companies or industries which are smaller than we cannot afford this process and simply disappear from our national economy.

In time, the foreign competitors which now control the marketplace raise their prices. The consumer does not benefit. The small business owner loses. The economy loses. The trade deficit grows larger.

What has happened to our industry dramatizes the ineffectiveness of our trade laws, at least for small business.

The laws should make our government agencies our advocate, not our adversary.

The burden is far too high for small business to bear. The results are negligible.

The prevailing governmental philosophy is not supportive. Indeed, without the support and aid of Members of Congress, including Congressman Ireland, Congresswoman Kennelly, and particularly Congressman Conte, who represents our district, we believe we would not have prevailed originally, nor would we be able to maintain the position that we now have in the marketplace, even though we were right.

Photo albums are a small consumer item. I don't know why the issue is as large as it is for Korea. I don't know why we are fighting the country of Korea on this matter, but I want to comment on a small quote out of a recent transcript of a program of Adam Smith and the Economy who appears on PBS, and he has done a recent series on Asian countries.

The Korea Herald tells us that photo albums have increased in export quantity, 69 percent over the past year. This is Adam Smith talking, with information provided to him while he was in Korea, quote:

> Korea's trade problems with the United States began with a couple of antidumping cases. One, curiously, involving photo albums. The United States slapped a 65-percent tariff on photo albums and the Koreans were stupefied. Seoul streets were filled with out-of-work album makers.

Now, folks, I had a question asked me by public radio actually, they said, how do you feel about all those Korean photo album makers you put out of work?

And the answer is, I am sorry——

Mr. **Skelton**. Are you sure it is printable?

Ms. **Shaine**. Pardon me?

Mr. **Skelton**. Are you sure it is printable?

Ms. **Shaine**. Better they than we.

I don't believe we did that. But that is the story put forth by Korea, not only to our media in this country, but to USTR, and to the Department of Commerce, and in a variety of different ways through the State Department.

And what you have is, that country, for whatever reason, fighting two very small companies in this country without the support of our country behind us. It is a tough struggle and it shouldn't have to be that way.

I hear you talking, Congressman Ireland, and I certainly subscribe to everything you have said. I can't believe that there isn't a way to change the philosophy in our departmental agencies with which we all have to deal so that they are working with us and not against us.

That is the bottom line of the story and I hope we find a way to address the injuries that we find ourselves confronting every day.

Thank you.

Mr. **Skelton**. Thank you so much, Mrs. Shaine.

Mr. **Bilbray**. Mr. Chairman, can I ask one question on that one?

Mr. **Skelton**. Yes.

Mr. **Bilbray**. I was just curious—in 1984 you discovered that the Koreans were dumping at less than their value.

Would you give me an example exactly what facts determined that?

Ms. **Shaine**. We were slow to recognize what had happened to us. Let me comment that the country of Canada had imposed a 35-percent antidumping tariff on photo albums coming in from Korea in the year or two before we became aware of it.

We became aware of that tariff. We saw prices go down—the 100-page album is the staple in our industry, it is 50 sheets, 100 pages—we saw prices go down during 1984 from $4.25 wholesale to $2.90 wholesale, delivered in this country.

Mr. **Bilbray**. OK; how, exactly, are the Koreans subsidizing directly.

Ms. **Shaine**. We, like the steel industry, have not found the means of subsidy yet. It is endemic in Asian countries that books are not kept in a regular manner. The steel industry is very big, but they, and we, have been in pursuit of the same set of circumstances.

I know what it costs to buy paper in Korea. I know what it costs to buy corrugated board in Korea. I know what it costs to buy cover material. I know what it costs to buy glue and plastic, because I buy those same things and I buy them internationally.

I know that their companies are not automated and I know that the cost of labor in product is less than 10 percent. So that even were they to be halving or quartering the cost of labor, that would not permit them to be selling the product legitimately delivered in this country at the prices that they had. So it is a constructed price question, because they had no third country, they had no home sales.

In Korea it is a managed economy. The companies that make photo albums for export are not allowed to sell them in the domestic economy. So there were no original country sales. There were no third country sales to speak of. It was all United States. So the Department of Commerce ended up using constructed costs.

We are internationalists and our knowledge of our materials go——

Mr. **Bilbray**. My question is, are they selling for $2.90 apiece?

Ms. **Shaine**. Right.

Mr. **Bilbray**. Are you telling me then that it cost them more than $2.90 apiece to produce, or was it less than $2.90 but they weren't taking a reasonable profit on the sale?

Ms. **Shaine**. I can only give you my figures, which would tell me that they could not make and ship at $2.90 and be profitable.

Mr. **Bilbray**. I see. So in some way or another the Korean government or some entity was subsidizing that particular industry. Do you have any idea who it was? Was it the Korean government?

Ms. **Shaine**. I must speculate. This is a predatory industry practice. In this country you go to the FTC. But this is a typical situation where there is a targeted industry. And for whatever reason, they decided they could take care of the photo album industry in this country. So somehow they are encouraged to sell at lower costs than they could do profitably. Where the inflow of money is, I couldn't begin to tell you.

One easy way is that the minute they get a letter of credit they go to the bank. They get a loan at very low interest rates, which they need not repay until after the letter of credit is paid. Koreans want the American dollar, so they encourage their small industries to do whatever they can in order to continue the inflow of U.S. money.

Mr. **Bilbray**. I was just asking that question because I know in Europe, and certain areas, they subsidize. But in this particular case I was unaware of how they did it and why they did it.

Ms. **Shaine**. If we could find the subsidy, we would have a countervailing duty case as well. We have been unsuccessful at determining that. We are not alone in that. But it is reasonable to know that you can't produce a product at less than cost forever.

But there are many instances of targeted industries. As a matter of fact, Dr. Merrifield in the Commerce Department has a really good piece of material on how all of that occurs, which I would be happy to send off to you.

Mr. **Bilbray**. I would love to have a copy, thank you.

Ms. **Shaine**. Fine, thank you.

Mr. Skelton. Mr. Greenbury?

STATEMENT OF MARK GREENBURY, VICE PRESIDENT, ARROWSMITH TOOL & DIE, SOUTHFIELD, MI

Mr. Greenbury. Thank you, Mr. Chairman and members of the committee.

Mr. Skelton. We will ask that your testimony be included in full in the record, without objection, and that you summarize your testimony so we will have a little more time for questions.

Mr. Greenbury. This is a summary.

Mr. Skelton. I am addressing all the members.

Mr. Greenbury. My name is Mark Greenbury, and I am Chairman of the Government Relations Committee of the National Tooling Machining Association. I am also third generation management of Arrowsmith Tool & Die, a small, family-owned, Detroit area metalworking company, which has been in business for 45 years.

In addition, today we are representing the Metalworking Trade Coalition, a group of 33 metalworking trade associations which, like NTMA, are made up of small business.

Legislation such as H.R. 1737 is badly needed. We recognize that there are many barriers in solving the problem caused by unfair foreign trade competition. We are hoping that many of them will be addressed in the trade bill passed by the House and under consideration by the Senate.

Passage of these bills will help our larger customers whose problems with foreign trade have indirectly affected us. Unfortunately, the trade bill will do little to help small businesses like mine as we face a steady increase in direct foreign competition.

The sad fact is that there are currently few practical remedies for small American businesses in protesting unfair subsidized foreign competition. The reasons are economic. Companies in my industry average only 15 to 20 employees and have less than $1 million in sales annually. The costs that would be incurred in hiring expert Washington counsel and conducting the necessary investigations could easily run from a quarter to half a million dollars.

While there exists within the Commerce Department an office to assist small business, both the resources and services are extremely limited. The Commerce Department office can provide a small business with a list of available options, the rules and procedures of trade law, and the examples of previous filings.

While this can save a minimal amount of legal fees that would be otherwise spent to reach the same conclusion, there is no way that a small company could afford the additional investment necessary to present a respectable case.

The practical choice, then, for a small business owner is to cut costs. This includes the reduction of overhead, including possible layoffs. And if there is no other alternative found, business closure. With this in mind, we would like to make the following suggestions with respect to the proposal: We agree that the office be placed within the Small Business Administration.

Number two: That there be initial screening following a complaint to assure that a company's problems are caused by unfair foreign competition. For example, I have travelled extensively in

Japan. I have also traveled extensively in Europe and gone through their manufacturing facilities. One of my major competitors is the largest independent die shop in the world, and they are Japanese.

They freely admit to me that the Japanese Government lets them depreciate their equipment, up to 80 percent in one year, based on their exports. With the new tax law, our depreciation has just been extended.

They are supported through trading companies. They have also freely admitted to me that, "We can beat you with respect to the American auto companies because our trading companies are subsidized by the government and will not let us lose money. We have never lost money on a job." That was a quote that I received directly from one of the owners of this particular company.

We lose money on jobs all the time, but we have to go into direct competition with people who have never lost money on a job and they can bid anything they want. In fact, we recently lost a $1.48 million fuel tank for one of the American automotive companies, to a Japanese firm—it happens to be the same Japanese firm, we understand from our sources—by less than .3 percent.

In respect to their payment terms—they are allowed to manufacture the tools for the American automobile companies and then they don't require payment from up to a year or a year and a half, because the trading companies step in and pay them [the tool suppliers] off. The American automotive companies can then pay the trading companies. We are not represented by trading companies. These particular trading companies are representatives of the Japanese Government, or so I have been told by the Japanese.

These are examples of what we would like to be able to bring to the office and, again, I do not have the means or the financial resources to investigate these types of findings myself.

Number three: That there be a needs test. Large companies can probably afford their own counsel. If a company is a small business, as defined by the United States Government, however, it should be considered eligible for the services of the office.

Fourth: The services available should cover everything necessary: The research, legal fees for the petition, and any appeals for follow-up that may be needed.

We believe that the services such as these to small businesses are legal under the General Agreements in Tariff and Trade. If there is a problem of governmental conflict of interest as when a small business might be appealing an administration decision, then funding should be provided from an outside counsel so the SBA personnel would not be placed in such a position.

This concludes my statement and I am happy to answer any questions. Thank you, Mr. Chairman and members of the committee.

Mr. **Skelton**. Thank you very much.

[Mr. Greenbury's statement may be found in the appendix.]

Mr. **Skelton**. Mr. McDonough?

STATEMENT OF LEO McDONOUGH, PRESIDENT, SMALLER MANUFACTURERS COUNCIL, PITTSBURGH, PA

Mr. McDONOUGH. Thank you, Mr. Chairman.

I am Leo McDonough, president of the Smaller Manufacturers Council, which is a trade association in Pittsburgh, PA. We are also one of the founding members of Small Business United and National Small Business United.

What we like about H.R. 1737 is the explicit effort being made to simplify and ease document requirements for small business seeking relief from dumping.

The principal problem, of course, is the cost of documentation that companies are faced with; often up to $500,000. You could liquidate the company in many instances for less than that.

We have a company by the name of Flowline in New Castle, PA. Recently it cost Flowline $100,000 to fight this particular battle. They do $10 million in sales. Clearly, they are in no position to afford $100,000 for the required documentation.

Not as successful was the foundry industry a few years ago. They tried to do something about dumping. They spent $200,000 and couldn't come up with enough information to be able to win their battle.

Mr. SKELTON. What industry?

Mr. McDONOUGH. The foundry industry.

As a result, the case was dropped because they got nowhere with it. It was $200,000 spent with nothing accomplished.

You have heard many more examples than I can even begin to tell you, so there is no point in me taking all your time now going back through those.

Mr. SKELTON. Your testimony will be included, as the others, without objection.

Mr. McDONOUGH. As often is the case in legislative interest, many of our members have mixed feelings about H.R. 1737. Small businesses are independent, they don't like government intervention in a lot of different ways, so you will find a certain cadre of small businesses who would be against this because they would see it as intervention.

But there are many, many more of them who see it as an absolute necessity, and those are the ones that I am trying to represent right now.

A small business, in many instances has a tough struggle trying to be heard in Washington. Everybody talks about how many jobs we produce, how many of us there are, and everything else, but we don't have a clout that goes in full measure with those numbers. It is our own fault because we are just a little bit too fragmented. It is a shame that we can't get our act together a little bit better sometimes.

Ten years ago, President Carter signed the Office of Advocacy bill and, again, I am happy to say that it was our organizations and coalitions that worked for the bill. Margaret Heckler introduced it, and had it passed. So we have a strong feeling about the Office of Advocacy.

As far as I am concerned, the absolute best place to put this new activity is in the Office of Advocacy. But, as you know, everything is dumped on the SBA; all kinds of things that they weren't even designed to do. And yet, statistics I have that from 1980 to 1985 show that the SBA decreased; their budget decreased, from $1.2 billion to $600 million, and from 4,275 employees to 3,910. And yet, we keep on coming up with more jobs for them to do.

I think one of the recommendations that we would make is absolutely that the Office of Advocacy should house this particular situation, but we should put enough teeth in the law that SBA can get the job done.

There are government agencies here in this town who don't even know small business exists. And when we try to get to them and talk to them, we can't even get to first base with them. I think if we have an Advocate in those offices like we are supposed to, and that person has the clout to be able to demand getting information, then the information is going to be forthcoming.

You might consider at first approaching it from Advocacy to do it on an industry-wide basis, because there are so many companies that need help. If the Office of Advocacy could take on a battle—let's just use the foundrymen for a second—and get the kind of research it would take for them to be able to fight it, then every small foundry in the country could use that information. It might speed the process of getting it out to more companies faster.

The only other suggestion is that perhaps they could put together some sort of a blueprint outline that companies could follow in finding out where to go for information and in putting together their own plan of attack. This would help hold down the expense of it all having to be done by the government. It would give the small companies a way of doing it and maybe a shortcut where they could save money and try to do some of their own work on it.

We are grateful to Representative Ridge for his bill. We thank the committee for working on it and we certainly hope it will see the light of day. We will do everything we can to help get it passed.

Thank you.

Mr. SKELTON. Thank you.

[Mr. McDonough's statement may be found in the appendix.]

Mr. SKELTON. Mr. Austin?

TESTIMONY OF ROBERT R. AUSTIN, EXECUTIVE VICE PRESIDENT AND PART OWNER, NOVA TECHNOLOGIES, INC. AUSTIN, TX

Mr. AUSTIN. Thank you for the opportunity to come before the Small Business Committee.

Before I start, I would like to say this will be made available for the record.

Mr. SKELTON. Without objection, like the others, it will be put in the record in full. You may summarize, please.

Mr. AUSTIN. Yes, thank you.

What I have heard today is certainly encouraging to me. I testified back February 20th before another committee, and the statement I am making today was presented before them also. Much of what I hear today I wish Mr. Bilbray would ask me those same questions. I would like to answer the questions you have been asking all the others.

I am Bob Austin. I am president of a company called NOVA Technologies in Austin, TX. Prior to having this company, I was in international business, which I still am, but I have lived and worked in over 20 countries, and I have experienced business methods of operations not only here but in several countries overseas.

Why I am here today is in my role as president of NOVA Technologies and also a part owner of this business. Our company was started in 1982. The goal that we started our company on was after Martin Luther King and Robert Kennedy was killed, a Presidential Commission on Crime was formed to study violence in America.

What the committee recommended was that America needed a nonlethal weapon for self-defense. With that goal in mind, in 1982, NOVA Technologies, using electronic pulse technology, which is utilized in the medical industry for testing nerve damage, developed a product which we called the NOVA XR-5000.

The NOVA XR-5000 works by relaxing the muscles, so when you have an attacker or you touch the person—it is a touch device, a defense device, not an offensive weapon—the muscles relax, the attacker falls to the ground. This gives the individual time to get away to a safe place; the law enforcement time to apprehend the suspect.

With the product that was developed in September 1982, we developed it for the private citizen market. The law enforcement market picked up on it as being an ideal nonlethal weapon; it does not cause any injury. We were successful.

In April 1985, our sales had reached 18,500 units. In that same time, counterfeits from Taiwan started flooding the market—exact copies. I have copies of all the counterfeits here. But they started coming in in April 1985.

Our average sale in 1985 was roughly 10,000 units a month. Our average sale in 1986 had dropped to 1,900 units a month.

We tried to beat the counterfeiters and the foreign imitation sellers in the Federal court system. We retained legal advice—counsel—in 1985. We were made aware of the ITC, International Trade Commission. We were advised that our best course of action would be to fight the counterfeiters through the Federal court system.

We took that advice. We have filed four Federal lawsuits against six companies. We won all cases; incurred over $500,000 in legal fees. We have collected basically nothing. We have won all the cases. We now have a horrendous legal bill to pay because we were not able to collect any funds.

The last case we have had in Federal court was in Florida; where in April of last year, we won that case and were awarded $87,000 in legal fees. The counterfeiter in that case was selling a product out of Taiwan which he produced records in Federal court that he had made over $1 million selling them out of his home. He also testified that he had taken our product to Taiwan and had them made and copied.

Although we had won the case in April 1986, we still are waiting for that judge in Miami to issue a final decision. He has awarded us attorney's fees. We have collected nothing. The law firm that helped us in winning that case has now dropped us because we can't afford to pay their bill.

Within three weeks of winning that case, a company in California started selling the same product that we won in in Federal court in Florida. A person that runs that company is an attorney. We are currently in litigation with them. So within three weeks he is selling the same product.

I made a trip out under my other business and made a buy on this individual, undercover, to where I could take this device back to the Federal judge in Florida and show that this product was still being sold. I am still waiting to see the Federal judge. This is July 1987; the Federal judge still has not seen me.

That company that was selling the product now is using my brochure to sell his product. He is telling people that he is going to—we are in litigation and he is going to drive my company out of business. He is even having his distributors—some of the distributors are telling people that we are already out of business; that he bought our company; that his product is our product. Unbelievable things are happening in trying to fight the counterfeiters.

I am even cautious in using the words in our system of counterfeiter or imitation, because in this case I could have the counterfeiter actually file suit on my company for unfair trade practices. So by filing—since I could not get in to see the Federal judge in Miami, the attorney was able to file in California, which means now I have to fight him in the California system, in the courts in California—and I am an Austin-based, TX, company.

So our legal fees have been astronomical. I am currently paying 15 to 20 percent of my gross revenue to attorneys. I have to pay this. These are for ongoing legal fees. The roughly $250,000 in attorney's fees that I can't pay—and I am hoping to be able to recover to pay those—those are being set aside. I am looking at possible litigation from these attorneys to my company as far as trying to collect these fees. I have to get new attorneys to fight my ongoing cases against counterfeiters. And these ongoing legal fees I currently have are as much as 15 percent of my gross revenue. I am talking about revenue that basically I can't survive on.

My company, in 1985, had 38 people. I am now down to 10. The assembly of my product is done by another Austin company, which had 28 people assembling my product; they are now down to 5. They have also had to take Chapter 11. I met with them yesterday in trying to make them feel a little bit more comfortable about working with our company.

When I testified back on February 20th, my opening remarks were, within the next few weeks we have to make the decision on whether to leave Austin or move our manufacturing facilities to Mexico. That was February 20th. I can tell you today, July 9th, that part of our manufacturing is now being done in Mexico.

I am continuing to manufacture in Austin because I believe in American manufacturing. I am paying a premium to manufacture in Austin, TX. It would obviously be more profitable—my company would have a better possibility for survival if I moved all of my operations overseas. I am fighting this, and I need help. I can no longer pay my legal fees. I am also faced with a possibility of filing Chapter 11.

It is hard for me to understand because we have sought help in Washington. We are fighting the Commerce Department. Here we are—we are certainly known by the Commerce Department; we are selling internationally. So every time we have a company overseas—Germany, Mexico, or Sweden, or various countries overseas—want our product; it is non-lethal, it has never produced a serious injury, so it is certainly an excellent product to minimize injury and to be effective for both law enforcement and private citizen.

So we have a market overseas. We go to the Commerce Department. They sometimes delay our permit from 6, to 8, to 10 weeks. We can't find anybody that really knows how to address a question to find out where we are. We get very little support. We go through a scenario with them. Then many times they will send it back saying we don't have the form filled out properly—after even testifying in February and meeting with the Commerce Department again, we had an application sent back by the Commerce Department saying they didn't know enough about our business. It is a screening process the Commerce Department has sitting out there.

Here is someone new, I guess, got an application, and says, we don't know enough about your business, could you send us more literature? Well, we are already selling international. The head of the section knows me from telephone conversations with him. So the Department of Commerce certainly has restricted our efforts.

You get involved with the Department of State—the Department of State has denied us the right to sell our product, first, in South Korea; and South Korea is making a copy of my product; blatantly sold across the United States of America. They are selling here in the United States of America, and my State Department tells me I can't sell to South Korea when South Korea wanted to use my product for the 1988 Olympic Games.

They have denied me the right to sell in other countries. You try to get to them on exactly why are they putting my product out as not being acceptable. And you find out—during the Carter Administration in 1977 we had the human rights violation and they picked crime control devices as an item that cannot be exported to certain countries that may treat prisoners too brutally or not humane. So this was an item they picked, was crime control device.

The letter I get from the Department of Commerce says they are not letting me send my product to South Korea because my product would be helpful in deterring human rights violations. You look at the letter, and you say, why wouldn't we be sending my product there? There is this non-serious injury producing product. It is certainly an ideal device to be able to control a situation without producing any injury and now you are saying that I can't submit my product or send my product there.

The other products in there are fingerprinting machines, riot helmets, computers, and my product. My product has become internationally known as the stun gun.

I am in a situation where counterfeits and imitations are blatantly sold across the United States of America, they are inferior, they do not work, they do not put out the outputs to work.

Two weeks ago on the Today Show, a program was done on my type of a product. Every product shown on that show was a counterfeit. My product was not shown. There was no indication made that these products were actually counterfeits or imitations. So not only are these counterfeits being sold here, they are damaging our reputation.

I am a sole domestic manufacturer. I developed a product in 1982. I won four Federal lawsuits under the Lanham Act, and I have a patent which covers my product. And we have foreign units being sold here that are creating a bad image, are taking the majority of my market, and now I am also being restricted from trying to sell overseas.

I have certainly veered away from my prepared statement and I am sure there are several things I didn't include that I had wanted to say, but I feel a lot more comfortable talking than trying to read a statement.

Mr. SKELTON. We appreciate so much, Mr. Austin, your being with us and sharing the, frankly, rather bizarre experiences that you had.

[Mr. Austin's prepared statement, with attachments, may be found in the appendix.]

Mr. SKELTON. Mr. Schagrin, do you have anything that you can add, sir? We are running out of time.

TESTIMONY OF ROGER SCHAGRIN, ATTORNEY, SCHAGRIN & ASSOCIATES, ON BEHALF OF SMALLER MANUFACTURERS COUNCIL, WASHINGTON, DC

Mr. SCHAGRIN. Yes, Mr. Chairman, and other members, there is no need for me to add to the horror stories that you have already heard.

I am a trade attorney in Washington with my own law firm, Schagrin & Associates, and we actually specialize in giving trade counsel to small businesses, so I am very familiar with their horror stories. We normally counsel trade associations because, as you know, it is just impossible for a small business to afford the legal fees for unfair trade actions.

Mr. SKELTON. What about a situation like that?

Mr. SCHAGRIN. I would recommend—I am not a patent and trademark attorney—that you prepare a petition under section 337 for the ITC because the ITC has the authority nationwide to enter a cease and desist order that would stop importation of counterfeit products into the United States.

Mr. AUSTIN. I would like to address that.

Mr. SKELTON. Please do.

Mr. AUSTIN. I would like to address that. In 1985, when the counterfeit problem started, we sought legal counsel and it suggested that we not go to the ITC, that we go through the Federal court system. So remember, let's put things in perspective—I have won four Federal lawsuits. I have won four Federal lawsuits.

I called up the ITC after February and I was referred to the ITC again, and they said, why didn't you come to us? Why didn't you come to us? That was the first telephone call. Then they start getting involved, and you find, well, we are not sure now what exactly we can do. And after three or four phone calls you end up talking—and they don't know really what they can do. They can't get Customs to cease and desist unless you go before them and spend $250,000. It is very difficult for me to understand. If I have already won four Federal lawsuits, this is still America. Why do I have to defend again before the ITC something I have already won in four Federal lawsuits?

Mr. SKELTON. OK.

Mr. Bilbray?

Mr. BILBRAY. The only thing I wanted to say is I think all the stories, including yours, justify heavy penalties for these violations. The fact that he only got his attorney fees and he certainly did not get anything for his damages proves that. These companies make immense profits, and I know what is going to happen: He is going to get a cease and desist against this company. Eventually they are just going to form a new corporation in Taiwan or Singapore, remake the product, come back in, and he will have to sue them all the way through the line again—and it will be an unending story.

Unless we do something on this level to make the penalties so stiff that these people will not do it, like we did on the immigration laws, our businesses are not going to be able to compete. It is just a horror story.

Mr. SKELTON. We may have to have a discussion about the distributors that are comparable to the people who hire the illegal immigrants——

Mr. BILBRAY. That is right. I think the committee ought to get into that.

Mr. SKELTON. Mr. Lynch, do you have anything?

Mr. LYNCH. Yes, thank you, Mr. Chairman.

Did you say that the gentleman in California who is selling this product is a practicing attorney in the State of California?

Mr. AUSTIN. Yes, sir.

Mr. LYNCH. Could you provide, not on the record now but later to the subcommittee, that gentleman's name?

Mr. AUSTIN. Yes.

Mr. LYNCH. The second quick question: You said one gentleman was selling the product out of his house? Were major chains selling this product—you know, Sears, K-Mart, whatever?

Mr. AUSTIN. No, sir. The status with our product is currently no major chain will sell the product primarily because we are early in our life cycle. Our product is the type of device you need to spend about 30 minutes to talk to someone how it works, and most major chains do not have—and this is what the major chains tell me—they don't have sales staff sufficiently qualified to go into details on a product. Most people go into a major chain to buy on price. They know they are going to get the best price.

So most of the way our product is sold—our product today, we have a market access problem. We just developed a 30-minute television program, educational type program, which will go nationwide selling our product. We are very hopeful on this means of market access.

Our product primarily in the past has been sold through gun stores. One of our advertising pieces, as a matter of fact, says the most talked about gun in America is not even a gun, because our product is not a gun. It is like a TV remote control device which I would be pleased to show you.

Mr. SKELTON. I don't think you will have any volunteers for a demonstration.

Mr. Bilbray. I am curious, Mr. Chairman, has it been made illegal in some States?

Mr. Austin. There are currently five States where the device has been made illegal.

Mr. Skelton. Do you want to show us one?

Mr. Austin. Certainly.

Mr. Skelton. Just hold it up.

Mr. Lynch. While he is getting that, Mrs. Shaine, in your instance, it is different, all the photo albums are going through major chains; is that right, these Korean——

Ms. Shaine. They are out in the marketplace, yes, largely major chains, most of whom know——

Mr. Lynch. Know the situation but just take the other product anyway?

Ms. Shaine. Yes.

Mr. Skelton. They know the lawsuits are going on? They know of the problems?

Ms. Shaine. Most of them do, yes. Some of them are angry.

Mr. Skelton. Angry at you?

Ms. Shaine. Quite.

Mr. Bilbray. Will our counsel go up and demonstrate on him? [Laughter.]

Mr. Skelton. The minority counsel, right?

[Product demonstration.]

Mr. Austin. Remember again, this device is nonlethal. The way it works is on your neurological impulses that control your voluntary muscle movement. You touch an attacker with this, say, in the collar bone area, front and back——

Mr. Skelton. Does it work through the cloth?

Mr. Austin. Yes, it will go up half an inch of clothing.

Mr. Bilbray. It has to touch, though, is that correct?

Mr. Austin. Beg pardon?

Mr. Bilbray. It has to touch?

Mr. Austin. It is strictly touch. We wanted a defensive device. We did not want any offensive device, which obviously become—

Mr. Skelton. What does it do?

Mr. Austin. This device, first of all, works on a 9 volt rechargeable battery much like you see on a toy. You pull the trigger, you get, one, is an intimidation device [demonstrating]. That in itself is enough to repel most attackers. The next thing I will show you, if you don't mind, on myself, is when you actually get close, within a quarter of an inch—[demonstrating]—you will see the device.

Now, we won our four Federal lawsuits on a thing called the Lanham Act, which says you can't make a product that is confusingly similar to another product.

We also have a patent. Now, our patent says, hand-held electronic device for self-defense with a visible, audible spark display—[demonstrating]—hand-held electronic device with a visible, audible spark display. That seems to be probably pretty straightforward to most people. But that would be under the patent.

Now, what you have—and in your State of Nevada—I saw that you were from Nevada—there are two in Las Vegas, two companies in Las Vegas, one selling this device here. What they have done—again, speak off the record. I don't know, because—I am concerned about litigation. I have more lawsuits than I care to talk about. But I think many people could say that was similar.

Now this device used to be straight—but was concerned about the Lanham Act, the idea was, hey, we can make it a little bit different shape, maybe you won't be under the Lanham Act. But you can see it still has a visible—same design—visible and audible spark display. What they have done is just reverse engineer. This unit is made in Korea.

Mr. BILBRAY. What is the difference between what they sell for.

Mr. AUSTIN. This product, if you look—at a wholesaler price, this product—see, my wholesaler distributors, most of them, sell both my product and the foreign imitations and copies. It puts me in a situation where if I survive I have got to do business with people I don't want to do business with, because I really don't want my wholesalers-distributors handling a product which they know I have already won four Federal lawsuits. But they say, I am sorry, Bob, we are going to go ahead and sell it.

This device here—at wholesalers, you can pick up a particular magazine, one of my distributors advertises this product at $24.95. He advertises my product at $39.95. Now, I have prices from Taiwan. Taiwan says if we will make our product there they will shut all the counterfeiters down. That is the latest word I get from them.

This is a Korean device here. This is a product—what I didn't mention in my verbal statement to you was that, in our foreign market access, Japan has restricted and harassed my distributors trying to sell in their country. In the meantime, they have come up with a device like this in Japan. This was picked up in Germany. Still has a horizontal probe. Change the shape up a little bit. This is a Japanese product. This is a product here that we won against in Florida. It is called the power zapper. This is the same device that is being sold in California within three weeks afterwards.

See, when you have the manufacturer and the way the scenario works—King Jaw, a company that makes this in Taiwan. King Jaw—so we didn't file against King Jaw, which is Taiwan. We won against the distributor here. So you win against the distributor then another distributor goes to Taiwan, or Taiwan comes here and says, here's my product if you want to sell it. So everyone has everybody in court and it is a never ending story, like you mentioned. You could go on forever, and ever, and ever.

This is a unit here—what we have here. This is even a little smaller unit here—exact copy but it is a smaller size. This is Taiwan. To give you the problems that you have—this is an exact, as you can see it is truly reverse engineering because you see the switches on opposite sides, so they just reversed it.

This device is an exact copy. They have used our product to make the mold. And when I say our legal system, our Federal system is not working for us, it cost me $100,000 in legal fees to prove this is a copy of this device—it is silly.

I have here—this is the same product. I received this two months ago. This is a counterfeit unit where they have sent it into my company—NOVA Technologies—to be repaired. They have a bill of sale here made out saying this is a NOVA. They have my warranty slip. The counterfeiters are using my instruction book, cutting my picture out—the Korean unit, they cut my picture out, put their product in, same words throughout, same sketches, and then it has got Printed In Korea on the back.

The only thing I guess done by the law is they had to say it was Printed In Korea.

Mr. SKELTON. And they sent them to you to be repaired?

Mr. AUSTIN. Certainly.

Mr. SKELTON. OK, one last question.

Mr. LYNCH. Did you tell the producers of the Today Show the situation?

Mr. AUSTIN. Couldn't get through to them.

Mr. LYNCH. Just no response?

Mr. AUSTIN. We had the 30-minute educational program I mentioned to you. The producer of that show had some inroads to knowing the person that put on the program. It is a consumer advocate out of California.

What has happened, as a consumer advocate out of California did a program on stun guns and he used a counterfeit ad that was selling for $29.95—this is also, by the way, the company's based in Las Vegas that is doing it, going nationwide, with ads in newspapers and magazines. He picked up on it and he proved that the device didn't work. And we agree with him, the device doesn't work.

But he doesn't at the same time say that it is an American that developed it, their product has worked. I would like to just close—Phoenix's Maricopa County sheriff's department did a two-year independent study on my product, and they are in our 30-minute educational video. On a two-year study on our product used in the lake district around Phoenix, which is used primarily on drug addicts and drunks and controlling that situation, the effective takedown rate in using my product was 98 percent.

There was no injury to officer or suspect. The only injury received was a scratch which did not have to be treated—and this is a two-year period—98-percent effective takedown rate. I think you will check and find that the effective takedown rate on using a gun is 62 percent.

Mr. BILBRAY. And no permanent damage?

Mr. AUSTIN. No permanent damage.

Mr. SKELTON. Ladies and gentlemen, thank you. We have an excellent record here and we will go from here.

The meeting is adjourned.

[Whereupon, at 11:40 a.m., the subcommittee adjourned, subject to the call of the Chair.]

APPENDIX

IV

100TH CONGRESS
1ST SESSION

H. CON. RES. 76

Expressing the sense of the Congress in support of a private initiative established for the purpose of enhancing small business access to United States trade laws.

IN THE HOUSE OF REPRESENTATIVES

MARCH 12, 1987

Mr. PICKLE (for himself, Mr. DOWNEY of New York, Mrs. KENNELLY, Mr. FRENZEL, Mr. MATSUI, and Mr. ARCHER) submitted the following concurrent resolution; which was referred to the Committee on Small Business

CONCURRENT RESOLUTION

Expressing the sense of the Congress in support of a private initiative established for the purpose of enhancing small business access to United States trade laws.

Whereas the American entrepreneur plays a critical role in the development of new technology and the creation of jobs;

Whereas America's prosperity depends on small businesses and the jobs they create;

Whereas these businesses are increasingly affected by foreign unfair trade practices;

Whereas United States trade laws have become increasingly complex through successive changes;

Whereas many of these businesses lack the financial resources and expertise to seek remedy through United States trade laws against foreign unfair trade practices;

Whereas these small businesses may refrain from seeking remedy against foreign unfair trade practices due to prohibitive costs or lack of familiarity with United States trade laws;

Whereas unfair trade practices which go unchallenged may result in the loss of American jobs and technology through runaway plants or plant closings; and

Whereas legal assistance to small businesses in combating unfair trade practices would increase their ability to compete effectively in the world market: Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That it is the sense of the Congress that the corporate, legal, labor, and academic communities should pursue establishment of an independent organization to provide pro bono legal assistance to small businesses in cases involving foreign unfair trade practices. This organization should—

(a) develop an outreach program to inform small businesses of remedies available under United States trade law; and

(b) provide pro bono legal assistance to those small businesses lacking adequate resources to seek remedies under United States unfair trade laws.

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100TH CONGRESS
1ST SESSION

H. R. 1737

To provide access to trade remedies to small businesses, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 19, 1987

Mr. RIDGE (for himself, Mrs. JOHNSON of Connecticut, and Miss SCHNEIDER) introduced the following bill; which was referred jointly to the Committees on Ways and Means and Small Business

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A BILL

To provide access to trade remedies to small businesses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Small Business Trade Remedies Act of 1987".

SEC. 2. FINDING.

The Congress finds that since obtaining relief under existing domestic trade remedies is complex and expensive due to legal costs, documentation requirements for petitions, and judicial review, such remedies are unavailable to most small businesses.

SEC. 3. ESTABLISHMENT OF SMALL BUSINESS TRADE RELIEF OFFICE.

(a) ESTABLISHMENT OF OFFICE.—The Administrator of the Small Business Administration shall establish within the Small Business Administration's Advocacy Office (established under Public Law 94–305) the Small Business Trade Remedies Office (hereinafter in this section referred to as the "Office").

(b) FUNCTIONS OF OFFICE.—(1) The Office shall assist small businesses by preparing, initiating, and participating in, any proceedings relating to the administration of the trade laws of the United States.

(2) The Office—

(A) may, at the request of any person—

(i) initiate an investigation under section 702(a) or 732(a) of the Tariff Act of 1930 (19 U.S.C. 1671a(a) and 1673a(a)) in the same manner as the administering authority,

(ii) intervene in any administrative proceedings under title VII of such Act if the Director of the Office determines such person is a small business which is unable to finance the preparation of, initiation of, or participation in, such a proceeding, and

(iii) initiate cases which, in the judgment of the Director, have the greatest likelihood of success, and

(B) shall, for purposes of subparagraph (A)(ii), have all rights under title VII of such Act to which an interested party is entitled.

(3) An investigation shall not be prepared, or initiated by the Office with respect to any action which the Office determines to be frivolous or for purposes of harassment or delay.

(c) "SMALL BUSINESS" DEFINED.—For purposes of this section, the term "small business" means—

(1) a small business concern (within the meaning of section 3 of the Small Business Act (15 U.S.C. 632), or

(2) an association of which at least 80% of the members are small business concerns (as so defined).

(d) USE OF FUNDS.—The Administrator of the Small Business Administration shall, to the extent approved in appropriations Acts, use amounts otherwise made available for the Administration to carry out the purposes of this Act.

(e) EFFECTIVE DATE.—The provisions of this section shall apply to fiscal years beginning after September 30, 1987.

SEC. 4. STANDARD FOR PRELIMINARY DETERMINATIONS TO INITIATE PROCEEDINGS.

(a) PRELIMINARY DETERMINATIONS BY COMMISSION.—Sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)) are each amended—

(1) by striking out "based upon the best information available to it at the time of the determination," and inserting in lieu thereof "based upon information (available at the time of the determination) which was provided by the parties or generally available to the public,";

(2) by striking out "reasonable" and inserting "sufficient"; and

(3) by striking out "industry" each place such term appears and inserting in lieu thereof "small business as defined in section 3(c) of the Small Business Trade Remedies Act of 1987.".

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall apply to petitions filed, or investigations commenced, after the date of enactment of this Act.

SEC. 5. FACTORS TAKEN INTO ACCOUNT TO DETERMINE MATERIAL INJURY.

(a) IN GENERAL.—Section 771(7) of the Tariff Act of 1930 (19 U.S.C. 1677) is amended by adding at the end thereof the following new subparagraph:

"(G) SPECIAL RULES FOR SMALL BUSINESSES.—In any case in which the petitioner is a small business (within the meaning of section 3(c) of the Small Business Trade Remedies Act of 1987), the Commission, in making any determination as to material injury, shall consider the separate circumstances of the petitioner, including the fact that information may or may not be available to different petitioners by reason of different resources or otherwise. In circumstances where there is reasonable reason to believe that a small business is impacted by unfair competition, the Small Business Trade Remedies Office shall be empowered to collect the appropriate data necessary to continue proceedings.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to petitions filed on or after the date of the enactment of this Act.

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NOVA

July 9, 1987

STATEMENT OF ROBERT R. AUSTIN, EXECUTIVE VICE PRESIDENT AND PART OWNER OF NOVA TECHNOLOGIES, INC., AUSTIN, TEXAS, CONCERNING LACK OF ADEQUATE INTELLECTUAL PROPERTY RIGHTS PROTECTION IN THE UNITED STATES AND ITS SPECIFIC SEVERE IMPACT ON NOVA TECHNOLOGIES, INC.

INTRODUCTION

Within the next few weeks, we have to make the decision on whether to leave Austin and move our manufacturing facilities to Mexico. We are being forced to do this because of counterfeit and foreign copies of our Austin made product being sold freely here in the United States even though we have won 4 Federal lawsuits to shut down counterfeiters and foreign-copy sellers of our products.

We have already had to lay off approximately 30 people (70% of our staff) and these people are vital to the Austin economic situation. Our manufacturing is subcontracted to another Austin firm, and they have had to reduce staff used to assemble our product from 28 to 5 people, also vital to Austin.

The upsetting thing to us is, while we have to cut staff and impact their families' financial security, the foreign counterfeiters and copiers are selling their products, blatantly, across the United States and even right down the street from us in Austin, Texas. At the same time, our company is being denied the right to sell our U.S. manufactured products in several countries overseas by the U.S. Department of Commerce and the Department of State.

We have attempted to work within the United States system, and frankly, it isn't working in the best interest of American business. We have exhausted all avenues except soliciting the support of our public officials who should be concerned about the welfare of not only their constituents, but Americans in general.

We need your help!

OVERVIEW

NOVA Technologies is an Austin-based company which manufactures nonlethal electronic defense devices used by local, state, and federal law enforcement agencies and private citizens for self protection. We are formally requesting your help in fighting the battle against foreign counterfeits and foreign copies of our Austin, Texas made products.

NOVA Technologies is the developer and manufacturer of the NOVA XR-5000 nonlethal electronic defense device which has become internationally known as the "Stun Gun". We developed the product in late 1982 and began actively marketing the XR-5000 in 1983. NOVA is the exclusive owner of U.S. Patent Number 4,162,515, which covers our products, and we are exclusive owners of Trademarks NOVA and XR-5000. We are the sole domestic industry which manufactures this particular type of product. In 1985 we began experiencing an influx of counterfeit products and foreign copies of our NOVA XR-5000. This influx of foreign counterfeits and copies has and continues to severely damage the stability of our company.

Our monthly sales have dropped from a peak of 18,519 units in 1985 to a monthly average of 1,918 units in 1986. Our staff size has been cut back from a peak of 38 to a current level of 10. Our product is assembled by another Austin company, and it has had to reduce its staff employed to assemble our product from 28 to 5.

NOVA has tried to fight the counterfeiters and foreign copy sellers through our Federal Court System. NOVA has filed 4 federal lawsuits against 6 U.S. companies which sell foreign counterfeits and copies of our products. We have won all of these lawsuits, with the latest being Case Number 85-6747-CIV-KEHOE United States District Court, Southern District of Florida. Even though we have been awarded damages and attorneys' fees, we have been able to collect very little. In the Florida case, our attorneys' fees alone were $87,000.00, and we have been able to collect nothing even though the counterfeiter produced records showing he made over $1,000,000 selling foreign copies of our unit in the United States.

Even after winning the above case in Florida, we now have a federal lawsuit in California filed against us by a company that is selling the same foreign product we won against in federal court in Florida. We made "a buy" on this company as legally required, and have been trying to get a meeting with the Federal Judge in Florida to get an injunction to shut this company down. To date, we have been unable to arrange a meeting. The California company has taken advantage of this delay by filing on our firm in California. We now have to fight a case in California which should never have been allowed to be brought against us.

We urgently need your help. Speaking frankly, we don't have the financial resources to continue to fight the counterfeiters and foreign copy products in our U.S. legal system. We have tried many approaches to get help from our Federal Government and to date have received none. To the contrary, we continually have obstacles put in our path.

We have been the victim of our federal court system (we are still waiting on final judgement in Case Number 85-6747-CIV-KEHOE we won in April 1986 and continue to have foreign products being sold which we won against in other federal lawsuit cases); U.S. Customs Department (who advises they can't do anything to confiscate or stop counterfeit products crossing our borders); the Department of Commerce (delays in awarding export license up to 10 weeks, and in the case of South Korea, denying our right to sell products there while in fact South Korea can copy our product and documents and sell in the United States freely); the Department of State (which decides that South Korea may treat prisoners too brutally and, therefore, denies our company the opportunity to sell our product to law-abiding citizens of South Korea and, therefore, denies them the right to have a product for self defense which is proven to be medically safe and has never caused a serious injury).

We have experienced nothing but frustrations, amazement and financial loss in trying to work within the system established by our federal government. Each department "passes the buck" to another department to make the decision on who should have responsibility. The system is simply not working to the benefit of Americans.

We find the same lack of support from our federal government when pursuing international markets. To date, we have the Japanese government hindering and impeding our Japanese distributor in selling NOVA's product in Japan. In the meantime, Japan has developed a product similar to the NOVA XR-5000 and is selling it freely. The Taiwan government continues to allow manufacture of counterfeit and foreign-copy products in Taiwan by companies which we have won against in U.S. Federal Court. West Germany is preventing the sale of our product in Germany but allows a similar German product to be sold. South Korea is manufacturing a product similar to the NOVA XR-5000 and selling it freely in the United States while we can't sell our product in South Korea. Does the system look like it is working on behalf of Americans?

Our only hope at this time is that you, our Public Officials, can take up the fight with us. We are available, at your convenience, to answer detailed questions you and your staff may have on our company, the products we manufacture and the problems and obstacles we face with counterfeit products and foreign copies. The counterfeit products coming into the United States from Taiwan and South Korea are, we believe, a violation of not only our patent but also the Federal Statute known as the Lanham Act.

Specifically, we make the following recommendations to the Committee:

* Authorize the Customs Service to take action against counterfeits based on proven evidence of counterfeit imports - even in the absence of an ITC order.

* Strengthen U.S. Customs Service authority to act against counterfeit imports under the Patent Import Survey program.

* Authorize the establishment of a fund to provide partial compensation to small entreprenuers who successfully bring Section 337 cases. Perhaps funds could be gathered through punitive duties already collected by the U.S. Customs Service under existing unfair trade laws.

* Take a tougher stance on trade relations with countries which restrict or impede the sale of U.S. products in their countries while at the same time allowing the manufacture and sale of their products which infringe on the patent of U.S. products. Taiwan, South Korea and Japan are countries where we have had the most problems.

NOVA

SALES HISTORY

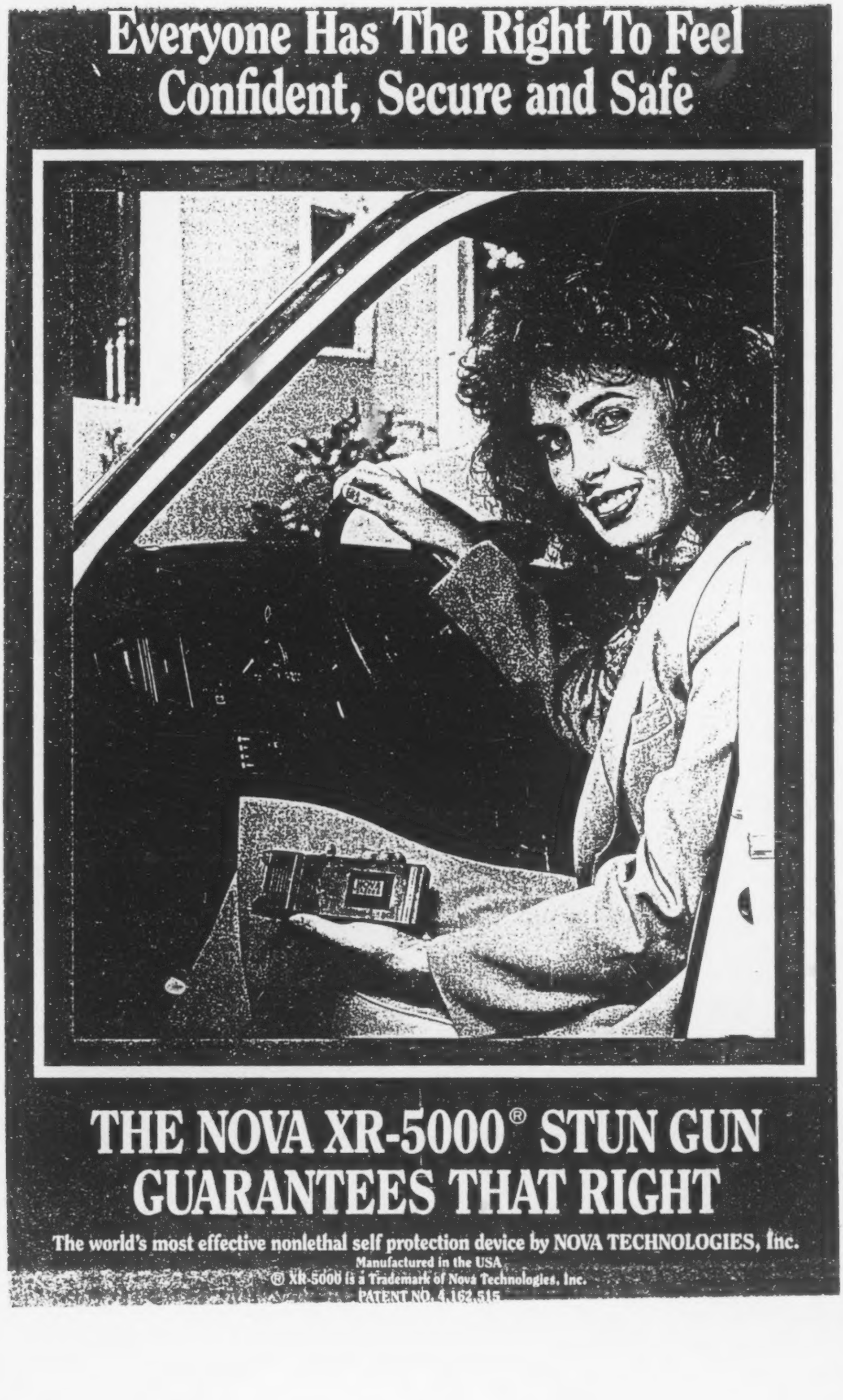
Summary

1982	235
1983	1,652
1984	53,176
1985	110,270
1986	23,023

January	1985	11,383
February	1985	11,043
March	1985	11,620
*April	1985	*18,519
May	1985	14,978
June	1985	7,097
July	1985	10,655
August	1985	3,515
September	1985	6,841
October	1985	4,426
November	1985	5,949
December	1985	4,244
		110,270
1985 Average		9,189/month

* Counterfeiters hit U.S. Market

January	1986	3,452
February	1986	456
March	1986	1,017
April	1986	4,606
May	1986	1,427
June	1986	1,932
July	1986	2,032
August	1986	1,346
September	1986	1,902
October	1986	1,601
November	1986	1,722
December	1986	1,530
		23,023
1986 Average		1,918/month



Everyone Has The Right To Feel Confident, Secure and Safe

THE NOVA XR-5000® STUN GUN GUARANTEES THAT RIGHT

The world's most effective nonlethal self protection device by NOVA TECHNOLOGIES, Inc.

Manufactured in the USA
® XR-5000 is a Trademark of Nova Technologies, Inc.
PATENT NO. 4,162,515

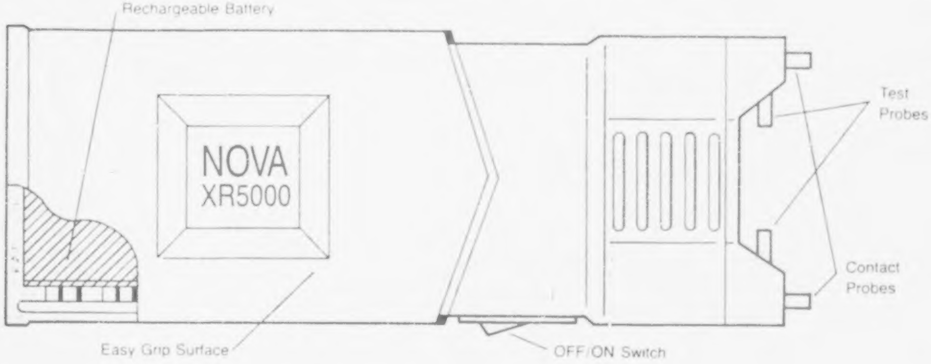
NOVA

XR-5000 STUN GUN

At one time or another we have all experienced the "chill" of being in a potentially dangerous situation and, worst of all, not being able to protect ourselves. Even if the law allowed everyone to carry a gun, how many of us could make the decision to take someone's life? The NOVA XR-5000 "Stun Gun," the ultimate **nonlethal** self defense weapon, gives you the option to protect yourself without worrying about the possibility of having to take a life. Guarantee your right to feel confident, secure and safe—carry a NOVA XR-5000 "Stun Gun."

A THREE-TO FIVE-SECOND JOLT FROM THE NOVA XR-5000 WILL DROP A POTENTIAL ASSAILANT TO THE GROUND, RENDERING HIM OR HER WEAK, DAZED AND PASSIVE!

- NONLETHAL
- ACCEPTED AS SAFE, NONLETHAL AND NONINJURIOUS BY THE MEDICAL AND SCIENTIFIC COMMUNITIES
- UP TO 45,000 VOLTS OF ELECTRICITY
- FITS IN YOUR HAND



SIZE: 6¼" × 2¼" × 1"

WEIGHT: 7½ oz. without battery, 8 oz. with battery. Constructed of non-reflective impact-resistant ABS. Incorporates a spring-loaded safety rocker arm switch.

OPERATION: To activate the XR-5000, one must compress the trigger switch. To deactivate the unit, the trigger is released. The unit must be applied to the suspect and the trigger switch pressed.

OUTPUT: The XR-5000 emits 40,000 to 45,000 volts but only 3 to 4 milliamps.

BATTERY: 9 volt nickel-cadmium rechargeable battery. (Do not use an alkaline battery.)

TYPES: G.E., Mallory; Rayovac; Eveready; and the new Nova (Sanyo) non-memory battery.

BASIC OPERATING PRINCIPLE: The Nova XR-5000 is based on solid state microchip technology. The unit produces an electric pulse which sends out frequencies into the neuromuscular system of the attacker and temporarily interrupts voluntary muscle control. The device does not depend upon pain, burning, or destruction of tissue to achieve its desired incapacitation effect. It uses the neuromuscular system in its natural mode to cause muscle contractions and a resulting loss of balance. When applied to a subject, the unit will key itself into that subject's neuromuscular system and will not transfer the same shock to anyone else in contact with the subject. The Nova XR-5000 was designed as a defensive tool. It fires no projectiles, therefore it is necessary to make physical contact with the object. **Suggested retail price $69.95**

NOVA TECHNOLOGIES, INC.
13706 RESEARCH BLVD., SUITE 100
AUSTIN, TX 78750
PHONE (512) 250-1307
FAX (512) 250-5741

Check your local laws to determine the legal way to carry a NOVA XR-5000 in your area.

Testimony
of
Eric I. Garfinkel
before the
United States House of Representatives
Committee on Small Business
Subcommittee on Exports, Tourism, and Special Problems
Concerning
Accessibility of Trade Remedies For Small Businesses

July 9, 1987

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE,

Thank you for the opportunity to testify today about the high cost of legal services in the international trade area, and the impact of such costs upon the ability of small businesses to obtain or preserve fair competition in world markets.

My testimony is based upon my observations as an attorney-advisor in the Office of the U.S. Trade Representative, as Deputy Assistant Director for Commerce and Trade, in the White House Office of Policy Development and as a practicing attorney in the international trade area. I am currently a partner in a Washington law firm and specialize in international trade matters.

In these capacities I have witnessed the escalation in recent years, both in terms of complexity and cost, of legal proceedings brought under U.S. trade remedy laws. This escalation began with passage of the Trade Agreements Act of 1979 which radically changed trade remedy cases from relatively straight forward administrative proceedings involving minimal cost, to highly confrontational adjudicatory proceedings involving all of the trappings of litigation including discovery, protective orders, and interlocutory appeals. While the 1979 Act improved the administration of the trade laws and assured more consistency in the decision-making process, the more adjudicatory nature of the post 1979 cases substantially increased the cost of obtaining relief.

Today, legal and consulting services in the international trade area range from $150 to $250 per hour. Prosecution of a typical antidumping or countervailing duty case entails a minimum of $150-200 thousand in legal and economic consulting fees. Market access cases filed under section 301, and unfair practice cases filed under section 337 of U.S. trade law can also exceed $200 thousand in fees.

The enormous cost of filing a case often leads to a decision by a small business not to contest an unfair trade practice. In these cases, the unfair practice continues unabated and may ultimately lead a small business to move production offshore, license technology to a foreign manufacturer or abandon foreign markets. This pattern results in the permanent loss of jobs, deterioration of the U.S. industrial base, and, in some cases, the needless transfer of U.S. technology to foreign sources.

As a Government official and a private attorney, I have observed an increasing number of domestic industries, who ravaged by unfair trade practices, lacked the financial resources to adequately defend their interests. The implications of this development are extremely adverse from the standpoint of U.S. competitiveness. Small business play a vital role in developing new technologies, and are responsible for generating more than 25 million jobs since 1970 in sectors such as biotechnology, electronics and communications. Small business are a predominant source of new technologies for large U.S. corporations, which as a result of their size, often lack the ability to develop and quickly exploit such technologies.

Concern over the potential consequences for U.S. competitiveness of barriers to small business access to U.S. trade remedy laws, inspired the idea of a private sector, public interest law firm to assist small businesses in the international trade area. Through the efforts of a number of international trade attorneys, former and current Government officials, steps were taken late last year to establish such an organization, which has been named "The International Trade Legal Fund". The Fund is being organized to assist small business on a pro-bono basis in filing and litigating unfair trade practice proceedings. Hopefully, the Fund will serve as a model for other private sector, pro-bono efforts throughout the country.

By assisting a small business in eliminating a foreign unfair practice, the Fund hopes to protect that business' ability to capitalize on its investment in research and development by turning its technology into actual products rather than farming out the technology for production in other nations.

Once fully established, the Fund will target its legal assistance toward foreign unfair practices likely to diminish the long-term competitiveness of a particular U.S. industry or group of industries. In addition, the Fund will provide assistance where contesting an unfair practice will establish a legal or policy precedent under U.S. or international law consistent with the goal of enhancing U.S. competitiveness through the elimination of foreign unfair trade practices.

In representing a potential plaintiff, the Fund will use a variety of methods to obtain the elimination of a foreign unfair practice including: filing formal complaints or petitions under U.S. law, raising the existence of a particular unfair practice in meetings with senior level Administration officials and Members of Congress, preparing and circulating position papers and briefs, and meeting with appropriate officials of foreign governments.

Because of limited resources, the Fund is likely to be in a position to accept only a handful of cases each year. The range of cases the fund will accept is fairly broad, and includes:

Formal and informal barriers to U.S. exports of goods and services including quantitative, licensing, standards, customs, government procurement, and regulatory barriers;

Formal or informal barriers to U.S. investment, including local content and export requirements;

Piracy of U.S. intellectual property rights;

Subsidization, dumping, and predatory pricing in the U.S. and third country markets; and

Government sponsored industrial policies which burden or restrict U.S. commerce.

Decisions regarding the acceptance of cases will be made by the Fund's Board of Directors, which will apply the following criteria in considering whether to accept a case:

Whether the potential plaintiff has the financial resources to retain traditional legal counsel to defend its interests (the Fund will only take those cases which otherwise would not be prosecuted because of a lack of financial resources);

Whether the case involves an important legal or policy precedent;

Whether the case is significant to the future competitiveness of a U.S. industry or group of industries; and

Whether the Fund's resources are adequate in view of the complexity of the case.

The Fund plans to have two full-time staff members, and will rely principally on the pro-bono time of adjunct staff to litigate its cases. The adjunct staff will be composed of international trade attorneys and economists with extensive experience in trade policy matters and unfair practice cases.

Cases will be assigned by the Fund to adjunct staff members on a rotational basis taking into account potential and existing conflicts of interest. The Fund also will establish a limited clerkship program for law, economics, and business school students who have demonstrated scholarship in the area of international economic policy or international law.

The Fund's Board of Directors will be comprised of individuals concerned about small business and U.S.

competitiveness including those who have served in senior positions in business, labor, government and academia. The Board of Directors will be responsible for the selection of cases and establishing the Fund's priorities. The Fund will apply for 501(c)(3) status as a non-profit public interest law firm and, as a result, will not accept legal fees, in any amount, from its clients. The Fund expects to rely solely upon contributions from private sector groups and foundations for its funding.

While private sector pro-bono groups, such as the Fund, are not a complete solution to problem of small business access to the trade laws, they can augment the efforts of the various trade remedy assistance offices established under the Trade Act of 1984. I also believe it would be useful for this Committee and other concerned committees in the Congress to undertake an examination of various approaches to simplifying U.S. trade remedy laws, in order to reduce the costs associated with obtaining relief from foreign unfair trade practices.

National Tooling & Machining Association

NTMA
PRECISION

TESTIMONY OF
MARK GREENBURY, VICE PRESIDENT
ARROWSMITH TOOL & DIE
SOUTHFIELD, MI
BEFORE THE
HOUSE SMALL BUSINESS SUBCOMMITTEE ON
EXPORTS, TOURISM, AND SPECIAL PROBLEMS
JULY 9, 1987
ON BEHALF OF THE
NATIONAL TOOLING AND MACHINING ASSOCIATION
AND THE
METALWORKING TRADE COALITION

9300 Livingston Road • Ft. Washington, Maryland 20744 • (301) 248-6200

Mr. Chairman and members of the Committee. My name is Mark Greenbury and I am Chairman of the Government Relations Committee of the National Tooling and Machining Association. We are also testifying on behalf of the Metalworking Trade Coalition, a coalition of 33 metalworking trade associations. Like members of NTMA, the bulk of their members are also small businesses.

Legislation such as H.R.1737 is badly needed. There are numerous barriers for small businesses to obtaining redress for problems caused by unfair foreign competition. Some of them will hopefully be addressed in the trade bill passed by the House and under consideration by the Senate. We hope that the best of both bills will be passed by Congress. That will certainly help our larger customers whose problems caused by unfair foreign competition have indirectly affected us.

Unfortunately, the trade bill will do little to directly help small businesses like mine who are increasingly facing direct foreign competition. The sad fact is that small businesses are currently precluded from practical remedies from unfair foreign competition and to a large degree they will continue to be even if the best of the Senate/House trade bills are signed into law.

The reasons are economic. Companies in our industry average 15-20 employees and under a million dollars in annual sales. The cost of hiring expert Washington counsel and conducting the necessary investigations can easily run $250,000-$500,000. While there exists within the International Trade Commission an office to assist small business, both their resources and services are extremely limited.

They will tell you the various options available to you, the rules and procedures of trade law and will share with you examples of previous filings. This can save you several hours of legal fees that would otherwise be spent to reach the same conclusion: there is no way your company can afford the investment to present a respectable case. Your practical choices are to watch your business and your employees dwindle to where the company is no longer viable or to close your doors and auction your equipment before you are forced into bankruptcy.

We are intrigued with House Con.Res. 76. We support the sense of the Resolution regarding the desirability of pro bono legal support for the small companies in need of such assistance. However, we are skeptical as to its feasibility. This need has existed for many years and such a resolution is not necessary to set up this type of pro bono legal service. While the visibility and attention stimulated by the Resolution may make the difference, we wonder where highly qualified human resources will come from. Trade law is complex and those charged with trade violations are invariably represented by well qualified counsel.

To go forward with a credible case, a small business needs many hours of support from an experienced and competent trade attorney. The latter command high hourly fees.

Nevertheless, the concept is certainly worth trying, so long as it does not preclude going forward with substantive improvements such as those embodied in H.R.1737.

We would like to make the following suggestions with respect to H.R.1737:

(1) That the Small Business Trade Office be placed within SBA, either in the Office of Advocacy or in the office of a new Assistant Administrator for International Trade;

(2) That there be an initial screening to assure that there may be unfair foreign competition, and that there is a good chance that the company's problems are caused by unfair foreign competition. By that we mean that a company should

be required to show more than declining sales and the suspicion that the problems may be caused by foreign competition. That initial screening should not necessarily require a small business to produce hard evidence it knows exists but is unable to obtain. As an example, companies in our industry have been told by U.S. automotive manufacturers that a number of our foreign competitors have suddenly and explicably significantly reduced their prices below those of U.S. suppliers. We are not in a position to ask our customers to ask for a copy of the quote nor would they be likely to respond to such a request. However, a government trade advocate could get that information as well as earlier quotes from the same foreign company to see if there was or wasn't an unexplained decline in my foreign competitors prices;

(3) That there be a needs test. As I mentioned, there are probably very few small companies that could afford the cost of a full blown trade case, but there may be some. If a small company or an association representing small companies can afford to pursue such a case without seriously threatening their economic viability, they should pay for it. What SBA should do once it determines the company has probable cause to initiate a case, is to next look at the company's reasonable future economic needs. For example, in my industry, we have to reserve significant amounts of

capital for continuing investments in sophisticated and expensive computer aided design and manufacturing equipment. If my company were to use funds intended for that purpose to hire trade counsel, we can be sure that as a result we will have less productive equipment and thus be less competitive in coming years. Once allowances for reasonable reserves for these and other reasonable business needs have been taken into account, the small business should be expected to use surplus funds beyond that amount (if any) to pay for services needed in connection with the case. The same principle should apply to an association as defined under Section 3 (c) of the proposal;

(4) The services available should cover "soup to nuts" if necessary. There is no sense in bringing a case if an essential element of the legal process cannot be provided a petitioner.

This concludes my statement. We would be happy to answer any questions.

STATEMENT OF
U.S. REPRESENTATIVE BARBARA B. KENNELLY
BEFORE THE
SUBCOMMITTEE ON
EXPORTS, TOURISM, AND SPECIAL PROBLEMS
COMMITTEE ON SMALL BUSINESS
JULY 9, 1987

MR. CHAIRMAN, I AM PLEASED TO BE HERE TODAY TO TALK ABOUT SMALL BUSINESS ACCESS TO REMEDIES UNDER OUR TRADE LAWS. YOU AND THE MEMBERS OF THE SUBCOMMITTEE ARE TO BE COMMENDED FOR FOCUSING ATTENTION ON THE DIFFICULTIES A SMALL BUSINESSMAN OR WOMAN FACES IN TRYING TO GET RELIEF FROM FOREIGN UNFAIR TRADE PRACTICES. I AM PARTICULARLY PLEASED TO HAVE THIS OPPORTUNITY TO DISCUSS H.CON.RES. 76, WHICH EXPRESSES CONGRESSIONAL SUPPORT FOR A PRIVATE SECTOR OFFENSIVE AGAINST THE BARRIERS TO U.S. TRADE LAWS THAT OUR SMALL BUSINESSES FACE.

I'LL KEEP MY STATEMENT SHORT GIVEN THE ELOQUENCE OF MY COLLEAGUES BEFORE ME. THEY HAVE OUTLINED THE VERY LEGITIMATE NEED FOR SUCH A PRIVATE SECTOR INITIATIVE AND THE VERY GOOD REASONS WHY WE, AS MEMBERS OF CONGRESS, SHOULD DO ALL WE CAN TO SEE THAT THIS INITIATIVE GETS OFF THE GROUND. THE WITNESSES WHO FOLLOW ME WILL INCLUDE SOME OF THE BEST TRADE LAWYERS IN TOWN WHO HAVE WORKED HARD TO SEE THIS PROJECT COME ABOUT. THIS SUBCOMMITTEE WILL ALSO HEAR SOME HAIR-RAISING ACCOUNTS FROM SMALL BUSINESSES WHO, DESPITE LIMITED RESOURCES, HAVE TRIED TO GET RELIEF UNDER OUR TRADE LAWS DESIGNED TO COMBAT THE UNFAIR TRADE PRACTICES OF FOREIGN COUNTRIES.

IN PARTICULAR, I WOULD LIKE TO DRAW YOUR ATTENTION TO ONE OF THE WITNESSES WHO WILL FOLLOW ME -- MRS. FRANCES SHAINE, CHAIR OF A COMPANY THAT MAKES PHOTO ALBUMS, THE SPM MANUFACTURING CORPORATION. SPM IS LOCATED IN HOLYOKE, MASSACHUSETTS, A TOWN THAT IS JUST OVER THE BORDER FROM MY DISTRICT IN CONNECTICUT. THIS FAMILY-OWNED COMPANY OF ROUGHLY 350 EMPLOYEES HAS JOINED A FEW OTHER DOMESTIC PHOTO ALBUM MAKERS FIGHTING UNFAIR PRACTICES BY FOREIGN PHOTO ALBUM MAKERS. TO DATE, THEY HAVE SPENT $400,000 AND THREE YEARS ON THEIR BATILE. WORSE STILL, IN 1987 THEY ARE FACED WITH ANOTHER QUARTER OF A MILLION DOLLARS IN COSTS IN THEIR ONGOING BATTLE TO PREVENT THE END-RUNNING OF OUR TRADE LAWS BY OTHER COUNTRIES.

FACED WITH LEGAL FEES IN THE INTERNATIONAL TRADE AREA OF $150 TO $200 DOLLARS AN HOUR AND LOOKING AT FINANCIAL COMMITMENT THAT RANGES IN THE HUNDREDS OF THOUSANDS OF DOLLARS, A SMALL BUSINESS MAY SIMPLY CLOSE DOWN SHOP. THIS IS A TRAGEDY THAT SIMPLY SHOULD NOT HAPPEN. AND IT DOESN'T HAVE TO. THE AMERICAN BUSINESS, LEGAL, LABOR, AND ACADEMIC COMMUNITIES CAN WORK TOGETHER TO COMBAT THE BARRIERS TO OUR TRADE LAWS THAT THESE SMALL BUSINESSES FACE BY GETTING BEHIND THIS EFFORT TO PROVIDE OUTREACH SERVICES AND NECESSARY LEGAL ASSISTANCE TO THOSE SMALL BUSINESSES WHO HAVE FOUND REMEDIES TO UNFAIR TRADE PRACTICES BEYOND THEIR REACH.

THIS RESOLUTION WON'T COST ANY FEDERAL DOLLARS. WHAT IT WILL DO IS GIVE NEEDED SUPPORT TO EFFORTS TO HELP OUR SMALL BUSINESSES AND OUR ENTREPRENEURS UNTANGLE OUR COMPLEX TRADE LAWS AND BRING TRADE CASES.

MR. CHAIRMAN, THIS SUBCOMMITTEE IS WELL AWARE OF THE CONTRIBUTIO OUR SMALL BUSINESSES AND ENTREPRENEURS MAKE TO A HEALTHY ECONOMY. BY HELPING THESE BUSINESSES ELIMINATE UNFAIR FOREIGN TRADE PRACTICES, WE CAN ENSURE THAT THEY CONTINUE TO MAKE THAT CONTRIBUTION. THANK YOU VERY MUCH.

STATEMENT OF LEO McDONOUGH, PRESIDENT, SMALLER MANUFACTURERS COUNCIL, PITTSBURGH, PA

Thank you, Representative Ridge:

I appreciate the opportunity to appear before this committee today. As you know, I am President of the Smaller Manufacturers Council of Pittsburgh. We represent more than 2800 small businesses in Western Pennsylvania. In addition, in our unofficial role as the Voice of Small Business in Pennsylvania, we have dealings with the problem of _all_ types of small business throughout the state. We are also a founding member of Small Business United and National Small Business United.

What particularly attracts us to your bill is the explicit effort to simplify and ease the documentation requirements for small companies seeking relief from dumping. I have several instances that may help to illustrate why we consider the documentation requirements a giant stumbling block for small business.

The principal factor is cost. As you have stated, costs on single case can run to upwards of $500,000, often more than the liquidation value of the company seeking help.

Recently, the Flowline Company completed a successful effort to secure relief from dumping by Japanee and Chinese manufacturers. Based near Pittsburgh in New Castle, Flowline does less than $10 million in sales of fittings annually, yet its efforts to eliminate dumping cost more than $100,000.

Not so successful were those of the foundry industry in the U.S. Several years ago, in an attempt to stop the overwhelming tide of imports of all sorts of foundry products, ranging from cast bronze marine propellors to manhole covers, the industry's association was unable to secure enough documentation to convince the International Trade Commission of the validity of its case. Because of fragmentation – just too many small foundries to be able to speak with a single voice efficiently-they couldn't tell their story effectively. Yet just the effort to draw the information together cost more than $200,000 in legal fees.

I'm sure you could give many many more examples of how the Trade Protection Bill has not really protected the small businesses that are so important to our national economy but which, because of their size, are least able to protect themselves against the depredations of foreign manufacturers.

As is often the case in matters of legislative interest, many of our members have mixed feelings about House Bill 1737. Or, perhaps I should say, our membership in total has mixed feelings about the bill--some are for it, others have some reservations. I'll deal with the reservations first.

Small business owners are very independent and are the first to say get Government off our backs. Anything that smacks of Government intervention is frowned upon by them. This segment of small business would oppose HB 1737.

Historically, we in small business have had a struggle to make our voice heard here in Washington. As you are personally well aware, our contribution to the growth of jobs in the nation is greater than any other sector of the economy, yet our so-called "clout" has not been proportionately large. We are to fragmented. There is a saying that if you put 10 small business owners in the same room, you would get at least 8 different opinions on any given subject. Yet, you also could say we are eager for all the help we can get.

On the other hand, we're somewhat sensitive and perhaps a bit over-protective regarding Government intervention in any business matters. Ten years ago, President Carter signed into law the act creating the Office of Advocacy at the Small Business Administration. This position is designed to represent the interests of small business in the halls of Congress and throughout the offices of the Executive branch. I am proud to say Small Business United proposed this office and thanks to Congresswoman Margaret Heckler of Massachusettes the bill was introduced and passed. Now, I think we have a Forgivable nervousness about piling too much responsibility on this office unless the proper power and staff would be given to them also to carry out these additional duties. For years the SBA has been forced to handle disaster relief and other problems without the additional staff and funds necessary to do so. We wonder if adding another responsibility to the list of functions could dampen its effectiveness as our advocate.

From 1980 till 1985 the SBA budget had decreased from $1.2 billion dollars to less than $600 million dollars. The number of employees in that same period dropped from 4,275 to 3,910. Even with these cuts they have continued to carry out their mission for small business.

It may sound as though I am saying the SBA can't do the job you are suggesting for it in you bill. Believe me I am not. I am saying you might have to put some teeth in the bill to help them get the job done. For instance, to amass the information necessary to prove a company has been hurt by dumping you need statistics from the International Trade Commission, the Commerce Department and the Census Department as well. What if these departments don't want to be bothered? How much clout will your SBA employees need to get the information they need? And if they can be given that power will there be enough of them to service all the small businesses that request their help.

You might consider this suggestion: Perhaps the Office of Advocacy could research the problem on a "specific industry" basis so that all companies in that type business could individually apply the research to themselves.

The Office of Advocacy could also draw up a blueprint of how small businesses could not only use this information but that would show them how and where to get the information they need. I'm sure Trade Associations would support this type of activity for their members.

In conclusion, I think what we are suggesting might solve the problem and make it possible to successfully implement your bill. 1. Put the necessary teeth in the bill; 2. attack the problem on an industry basis to help more small firms more quickly; 3. enlist the aid of Trade Associations; and 4. have a blueprint drawn up by the SBA showing how to easily develop the necessary information to file a claim.

We are grateful, Representative Ridge, for your concern about our problems, for your efforts to find solutions, and for this chance to offer our views. Too often in the past, hastily-drafted solutions have become part of the problems they were meant to solve. This time, we can do better.

We have here an opportunity to provide small business in the United States with the protection its larger competitors have taken for granted. We support you on this bill. Please let us know if you need more information, or any additional assistance in securing its passage.

REMARKS OF CONGRESSMAN J.J. PICKLE
ON H.CON. RES. 76
BEFORE THE SMALL BUSINESS SUBCOMMITTEE ON EXPORTS
JULY 9, 1987

THANK YOU, MR. CHAIRMAN. I WELCOME THE OPPORTUNITY TO ADDRESS THE SUBCOMMITTEE REGARDING H.CON. RES 76, WHICH I INTRODUCED ALONG WITH CONGRESSMAN DOWNEY, CONGRESSWOMAN KENNELLY, AND CONGRESSMEN FRENZEL, ARCHER AND MATSUI.

H.CON.RES. 76 PROPOSES THE ESTABLISHMENT OF A PRIVATE INDEPENDENT ORGANIZATION TO ASSIST SMALL BUSINESSES IN TAKING ADVANTAGE OF OUR TRADE LAWS.

EARLIER THIS YEAR, I BECAME AWARE OF A SMALL BUSINESS IN MY DISTRICT THAT IS FACED WITH UNFAIR COMPETITION FROM FOREIGN COPIERS AND COUNTERFEITERS. THIS FIRM HAS BEEN FORCED TO CUT ITS STAFF AND IS NOW CONSIDERING A MOVE OUTSIDE THE UNITED STATES, EVEN THOUGH IT HAD WON FOUR FEDERAL LAWSUITS AGAINST UNFAIR FOREIGN TRADERS.

THIS SMALL BUSINESS HAS INCURRED LEGAL EXPENSES EXCEEDING $800,000 AT A TIME WHEN ITS SALES HAVE COLLAPSED UNDER THE WEIGHT OF FOREIGN COUNTERFEITS AND COPIES. DESPITE WINNING ITS LEGAL BATTLES, THIS FIRM HAS BEEN UNABLE TO PREVENT THE IMPORTATION OF THESE FOREIGN PRODUCTS. AT THE SAME TIME, THIS COMPANY IS UNABLE TO EXPORT ITS PRODUCTS TO MANY FOREIGN MARKETS.

NOVA TECHNOLOGIES, INC. IS FACED WITH A 'DOUBLE-WHAMMY' OF COUNTERFEIT IMPORTS INTRUDING INTO THE DOMESTIC MARKET FUELED BY VIOLATIONS, INTELLECTUAL PROPERTY RIGHTS, AND A LACK OF MARKET ACCESS TO FOREIGN MARKETS FROM WHICH AMERICAN-MADE PRODUCTS ARE SYSTEMATICALLY EXCLUDED.

ADD TO THIS RESTRICTIVE EXPORT LICENSING REQUIREMENTS AND OUTRIGHT GOVERNMENT PROHIBITION ON SALES TO SOME OF THESE SAME COUNTRIES AND YOU GET A PICTURE OF THE NIGHTMARE EXPERIENCED BY MANY SMALL BUSINESS PEOPLE.

MY CONSTITUENT IS ONLY AN ISOLATED EXAMPLE OF AN ALL-TOO-COMMON PROBLEM IN THIS COUNTRY. THERE ARE SMALL BUSINESSES IN THE DISTRICTS OF EVERY MEMBER OF THIS SUBCOMMITTEE THAT FACE THE SAME UNFAIR COMPETITION, AND THEY MAY SOON BE WEIGHING THE SAME DECISION TO CLOSE DOWN THEIR OPERATIONS OR MOVE OFFSHORE.

I INTRODUCED THIS LEGISLATION TO SIGNAL AWARENESS AND CONCERN ABOUT THE PLIGHT OF THE EXPORTING SMALL BUSINESS SECTOR AND TO ENCOURAGE A COORDINATED ATTACK AGAINST THE EXCLUSION OF SMALL BUSINESS FROM TRADE STATUTES WHICH ARE INTENDED TO COMBAT UNFAIR FOREIGN TRADE PRACTICES.

SMALL BUSINESSES FACE NUMEROUS CONTRAINTS IN PURSUING EXPORT MARKETS. THEY MUST FIRST DEVELOP A MARKETING PLAN, AND THEN FACE EXCESSIVE DOMESTIC LICENSING REQUIREMENTS.

AN ARTICLE APPEARING IN THE JUNE 22ND EDITION OF THE JOURNAL OF COMMERCE SUGGESTS THAT "SMALL FIRMS NEED PATIENCE" IN PURSUING ENTRY INTO FOREIGN MARKETS. BUT PATIENCE IS NOT SUFFICIENT FOR THE SMALL FIRM COMPETING IN THE INTERNATIONAL MARKET.

THESE SMALL BUSINESSES FACE A MAZE OF CONFUSING, FRUSTRATING PROCEDURES UNDER OUR CURRENT TRADE LAWS IN THEIR EFFORT TO FIND RELIEF FROM UNFAIR FOREIGN COMPETITION, AND VERY FEW OF THEM POSSESS THE RESOURCES TO PURSUE A CASE AGAINST THE OFFENDING FOREIGN COMPANY:

- LEGAL AND CONSULTING FEES FOR INTERNATIONAL TRADE cases RANGE FROM $150 TO $200 AN HOUR.

- PROSECUTION OF A TYPICAL ANTIDUMPING OR COUNTERVAILING DUTY CASE WILL REQUIRE A MINIMUM OF $150,000 TO $200,000 IN LEGAL AND ECONOMIC CONSULTING FEES.

- MARKET ACCESS CASES THAT ARE FILED UNDER SECTION 301 AND UNFAIR PRACTICE CASES FILED UNDER SECTION 337 CAN COST A SMALL BUSINESSMAN OVER $200,000 IN FEES.

THESE PROHIBITIVE EXPENSES, COUPLED WITH A LACK OF EXPERIENCE IN DEALING WITH INTERNATIONAL TRADE LAW, ARE FORCING MORE AND MORE BUSINESSES TO SHUT THEIR DOORS, RATHER THAN FIGHT BACK AGAINST THE TRADE ABUSES THAT CAUSE DECLINING SALES AND EMPLOYEE LAYOFFS.

THIS CONGRESS HAS TAKEN STEPS TO INCREASE THE COMPETITIVENESS OF AMERICAN INDUSTRIES AND PROTECT AMERICAN BUSINESSES FROM UNFAIR TRADE PRACTICES BY FOREIGN INTERESTS.

THE WAYS AND MEANS COMMITTEE JUST COMPLETED A MASSIVE OVERHAUL OF OUR TRADE LAWS TO STRENGTHEN EXISTING STATUTES AND EXPAND COVERAGE OF THESE LAWS TO ADDRESS NEWER MORE SOPHISTICATED UNFAIR TRADE PRACTICES:

- EXPANDED DEFINITION OF SUBSIDY TO COVER POLICIES GRANTING UNDUE BENEFIT TO A PARTICULAR EXPORT INDUSTRY
- EXPANDED COVERAGE OF OUR ANTIDUMPING LAWS TO PREVENT DIVERSIONARY DUMPING PRACTICES (WHEREBY DUMPED COMPONENT PARTS ARE INCLUDED IN IMPORTS. WE CAN NOW IMPOSE DUTIES ON PRODUCTS CONTAINING DUMPED INPUTS)

FURTHERMORE, H.R. 3 INCLUDES PROVISIONS WHICH ELIMINATE THE INJURY TEST IN INTELLECTUAL PROPERTY CASES, AND WHICH REQUIRE ACTION TO BE TAKEN AGAINST COUNTRIES THAT VIOLATE TRADE AGREEMENTS AND ENGAGE IN UNREASONABLE PRACTICES WHICH BURDEN OR RESTRICT U.S. COMMERCE.

THE WAYS AND MEANS COMMITTEE HAS BEEN CONSCIOUS OF THE PROBLEMS FACED BY SMALL BUSINESS. H.R. 3 INCLUDES REPORT LANGUAGE SUPPORTING THE ESTABLISHMENT OF A LEGAL ASSISTANCE TRADE ORGANIZATION COMPRISED OF AMERICAN BUSINESS, LABOR, ACADEMIC AND LEGAL PROFESSIONS TO PROVIDE PRO BONO ASSISTANCE TO SMALL BUSINESSES.

BUT, SADLY, WE HAVE DONE FAR TOO LITTLE TO ASSIST THOSE BUSINESSES THAT NEED OUR HELP THE MOST -- THE INNOVATIVE ENTREPRENEURS WHO VENTURE INTO NEW MARKETS WITH NEW IDEAS, RISKING THE UNCERTAINTY OF OUR ECONOMY TO DEVELOP NEW PRODUCTS.

I BELIEVE THAT THE AMERICAN BUSINESS, LEGAL, LABOR AND ACADEMIC COMMUNITIES ARE CAPABLE OF WORKING TOGETHER AND PROVIDING A SOLUTION TO THIS PROBLEM. THE PRIVATE SECTOR CAN COORDINATE AND LAUNCH AN OFFENSIVE AGAINST FINANCIAL BARRIERS TO SMALL-BUSINESS ACCESS TO THE BENEFITS OF U.S. TRADE LAWS.

THIS EFFORT, IN THE FORM OF A PRIVATE-SECTOR ORGANIZATION, SHOULD PROVIDE OUTREACH SERVICES AND NECESSARY LEGAL ASSISTANCE TO THESE SMALL BUSINESSES WHICH NOW FIND REMEDIES TO UNFAIR TRADE PRACTICES BEYOND THEIR REACH.

IN FACT, I AM AWARE OF ONE SUCH ORGANIZATION THAT HAS ALREADY BEEN ESTABLISHED WITH COMMITMENTS FROM TRADE ATTORNEYS TO DONATE THEIR TIME AND EXPERTISE.

AS YOU LEARNED FROM THE ATTORNEYS ON THE FIRST PANEL, THE COMPLEXITY AND EXPENSE OF BRINGING UNFAIR TRADE CASES NECESSITATES A UNIQUE APPROACH TO MAKING OUR TRADE LAWS WORK FOR ALL AMERICA.

WE MUST INFORM OUR LOCAL BUSINESSES OF THE IMPROVED CLIMATE FOR TRADE REMEDIES AND ASSIST IN BRINGING THESE BENEFITS -- IN THE FORM OF INCREASED SALES AND INCREASED JOBS -- BACK TO OUR DISTRICTS WHERE THE CLOSURE OF A FACILITY OR FAILURE OF A SMALL BUSINESS HAS AS GREAT AN IMPACT AS THE NATIONWIDE LOSS OF JOBS IN MORE WELL-PUBLICIZED, DYING INDUSTRIES.

I BELIEVE THIS IDEA, AS PUT FORTH IN THIS SENSE-OF-CONGRESS RESOLUTION, REPRESENTS A POSITIVE APPROACH TO ASSISTING THESE SMALL ENTREPRENEURS IN NAVIGATING THROUGH THE COMPLEXITIES OF U.S. TRADE LAWS AND THE EXCESSIVE EXPENSES ASSOCIATED WITH BRINGING CASES UNDER THESE LAWS.

ONCE AGAIN, MR. CHAIRMAN, I APPRECIATE THE OPPORTUNITY TO DISCUSS THIS RESOLUTION WITH THE SUBCOMMITTEE. I AM HAPPY THAT MY CONSTITUENT, BOB AUSTIN, IS HERE TO PROVIDE A GRAPHIC EXAMPLE OF THE ABUSIVE UNFIAR FOREIGN TRADE PRACTICES THAT ARE CRIPPLING THE SMALL BUSINESS SECTOR OF OUR MANUFACTURING AND SERVICE INDUSTRIES.

I LOOK FORWARD TO WORKING WITH THIS DISTINGUISNED COMMITTEE IN RESOLVING THIS SMALL BUSINESS PROBLEM.

NOTES ON TESTIMONY BEFORE THE
U.S. HOUSE OF REPRESENTATIVES SUBCOMMITTEE
ON
EXPORT, TOURISM, AND SPECIAL PROBLEMS

BY

HARRY R. RASMUSSEN

Executive Vice-President
Crest Industries Incorporated
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July 9, 1987

THE UNITED STATES PATENT PROCESS
A Small Business Perspective

SUMMARY

Crest Industries Incorporated is a small manufacturing company located in Washington State. Crest was incorporated in 1970 and manufactures products for the telephone industry. In the last three years Crest has lost almost ten million dollars in sales to foreign competitors who have either infringed upon Crest's U.S. patents, or used Crest's patents as a guide of what not to do when copying outright Crest products.

Crest as a small company has discovered that it lacks the necessary resources in time and money to adequately protect product by securing adequate patents when the product is invented. In addition Crest has discovered that it lacks the necessary resources of time and money to defend patents that have been infringed.

The Crest experience clearly demonstrates the need for either a substantial overhaul of the patent process or a new method to make it useable by small American manufacturers.

INTRODUCTION

The United States Patent process is unworkable for a small United States manufacturing company. It is; too complex, too costly, and too time consuming to file for a patent. If a patent is secured it is too costly, too time consuming to defend, and in most instances too easily avoided by potential competitors.

In the last three years, because of patent related issues, Crest Industries has suffered severe losses in revenue, personnel, and business stability. Today this loss of jobs and business is a typical occurrence for the small manufacturing company in America.

A brief look at the problems that face Crest are revealing. They are simple, easy to understand, and they typify fundamental problems related to the patent process, that unless resolved will continue to force small U. S. manufacturers into a business crisis.

For discussion it is most easy to consider Crest patent related problems as two separate cases. However,. while doing this the reader is cautioned to keep the "big picture" of the U.S. Patent process in mind and understand that these problems are intimately related.

The first case relates Crest's efforts to block a Hong Kong company from importing products that infringe its patents. This was dropped simply because Crest could not afford to pursue the suit and wait five years for a decision. The second case relates to a Taiwan company that, despite patents, is copying one of Crest's products. This is a part-for-part copy that is being marketed to one of Crest's largest customer.

PATENT INFRINGEMENT BY A HONG KONG COMPANY

Issue: A small U. S. manufacturing company cannot afford to defend its patents.

Summary: This case demonstrates the inability of a small firm to use the U.S. patent process as now constructed. It is simply too costly and time consuming. For the patent at issue in this case the United States patent process took more than three years and cost more than eleven thousand dollars. When the infringement fight was given up Crest had spent nearly fifty thousand dollars on legal fees and taken twelve months. At this point Crest was advised that to continue the fight could cost as much as $200,000 and take five years. Crest could not afford the time or expense. Never at issue was the validity of the claim, all lawyers believed that the patent would stand and that infringement would be found.

Case History: Crest in 1976 was the first company to invent the full featured two line telephone system that did not require a central control box or special wiring. The development process was arduous and lengthy. The development costs consumed all the money resources of a small company. However, once complete the product was outstanding. For the first time people with businesses or residences with two telephone lines, could purchase a telephone, take it home, plug it in, and enjoy all the features of a typical business system. This included, call hold, call conferencing, privacy, line status display, etc. Realizing the unique nature of the product, Crest sought, and was granted, various patents on the telephone system. The complexity of the patent process; searches, writing, even drawings was so foreign to Crest (and still remains so) that the services of patent lawyers had to be utilized. The cost of two patents totaled $20,000 and took three years to secure.

For about one year Crest enjoyed the results of its hard work. Alone in the marketplace Crest secured major purchase contracts with several Bell telephone companies, Sears, Radio Shack, large National telephone distributors, and major chain store operations.

After about one year, a period of time that had not allowed Crest to even recoup the cost of molds needed to produce the telephone, Crest was overwhelmed with competitors, all Asian, that were in violation of Crest patents. Crest's market share began to erode. This erosion continues to this day, despite product enhancements and reductions in costs.

In mid 1984 Crest, faced with an immediate and drastic loss of sales, chose to defend its patents against the company perceived to be the most flagrant violator. This company's product was so like Crest's that they could function together on the same circuit. In addition out of the hundreds of models of telephone styles available they chose to package their product in the same style of telephone that Crest had used for the previous two years. To the casual observer the products appear almost indistinguishable.

On advice of counsel an attempt to block the importation was made through the International Trade Commission (ITC). This was advised to be the most rapid and cost effective means available. For one year this avenue was pursued. After one year the ITC recommended that the matter be taken up in a formal patent court setting. At this time Crest was advised that this effort would cost at least $200,000 and take 5 years. By this time Crest had spent nearly $50,000 in legal fees, and company management had spent several man-months preparing and reviewing documentation relevant to the case.

Lack of time and financial resources forced Crest to drop its suit. Pursuing any of the other half dozen or so companies thought to be infringing was out of the question. Never at issue was the validity of the suit, all lawyers involved thought Crest would prevail. Indeed, shortly after this suit was dropped ITT, (International Telephone and Telegraph) sought and was granted, by Crest, the right to use the patent at issue in its own product. In addition it became obvious to Crest that the ITC when faced with tough or confusing argument, could only pass along the issue to the patent court.

A TAIWAN COMPANY COPIES A PATENTED PRODUCT

Issue: A product protected by a U.S. patent is copied.

Summary: This case highlights the lack of remedies available for a company to fight copy-cat manufacturers, especially those abroad. This case is important because the patent issued for this product did not protect the product. In fact it appears to have been a guide for the copier on what not to do in order to avoid outright infringement.

Case History: The original product developed by Crest Industries and the product that eventually led to the founding of the company was an electrical switch, the "TKM" (Transfer Key Miniature). This product was unique in design, it was tiny compared to the switches used at the time and represented a substantial cost savings to the customer. This product was developed over a period of three years. The development was costly. At great cost two versions of molds for the plastic parts had to be developed. Because of testing demands of AT&T, elaborate fastening systems had to be engineered. After the development Crest was awarded a patent on the method of making the electrical contact between the switch and screw terminal. This single, simple patent took Crest more than three years to secure at a cost of tens of thousands of dollars. At this time Crest was unable, (because of being a startup company and with all of the founders money invested in development), to seek and secure other patents. This was discussed at the time but there was simply no option, no money no patent.

After several years of manufacturing this product, in February of 1987, Crest discovered that a Taiwan company had copied the most popular (highest sales volume) switches in its product line. The product is a copy, and not a "close" copy. The parts are interchangeable. The labels are copied. The method of assembly is copied. Even the construction of the plastic molds from which the parts came are copies.

This product is offered at a lower price than the Crest product. This is easy to understand, of the 15 models of this switch that Crest offers and supports, the Taiwan company offers only four (which happen to be the big sellers). For Crest this present product represents two major design evolutions. These development evolutions are very expensive and for a company like Crest they are ongoing. If you copy product you save all these costs.

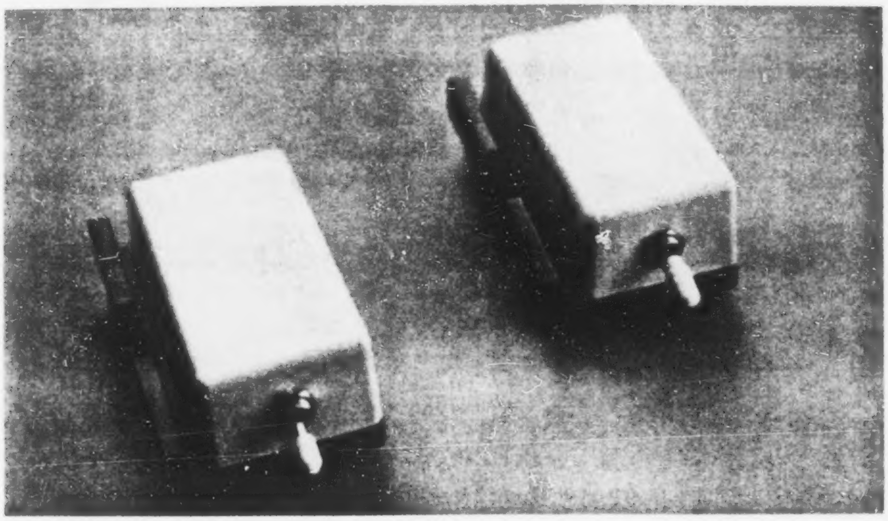
The Taiwan company is also copying Crest distribution and marketing plan. They have already been successful in capturing one major customer. In fact they worked with this customer to decide which products to copy and manufacture. So far this customer has not passed along its cost savings on these switches to their customers in the form of lower prices.

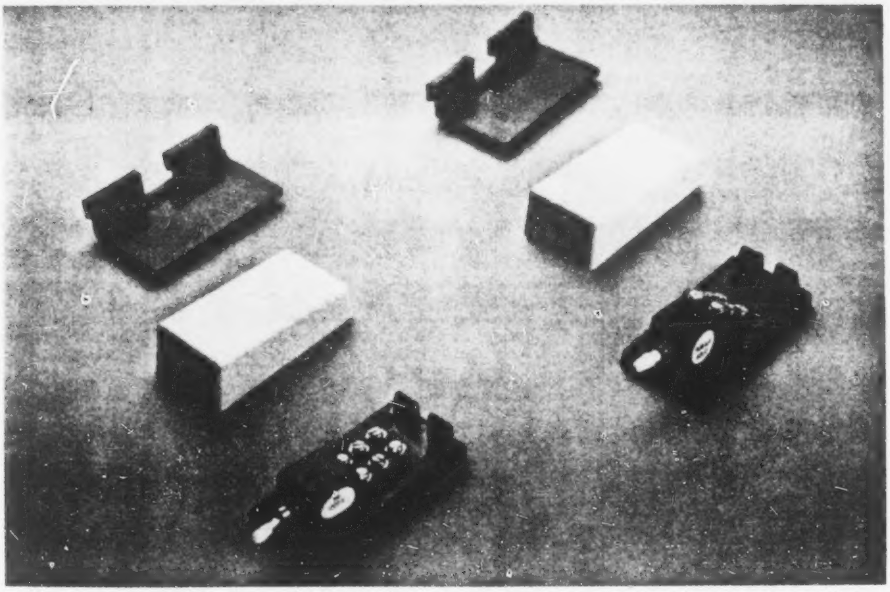
Crest finds itself helpless in this case. There seems to be no avenue to block this product. It is clearly a copy. The patent provided the guide for the copier. Perhaps more patents could have protected this product. However, for a start-up company this is simply not possible. A foreign company, should not be allowed to come to the United States, find a product and a distribution channel, then copy that product and channel. This is wrong! It should not be possible for a person or company, in the name of competition, to copy a product.

Copying robs the person being copied of all that effort it took to develop a product and marketplace. Copying robs the person doing the copying, of developing the skills necessary to produce a product of utility, innovation, and improvement.

The photographs on the next page clearly show the problem. A direct copy of a U.S. made product by a Taiwan company.

IS THERE A DIFFERENCE?

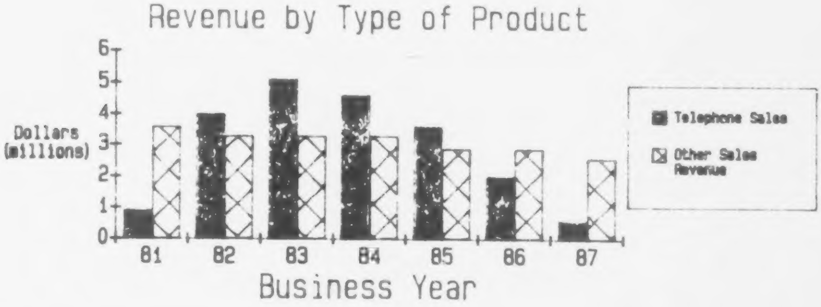




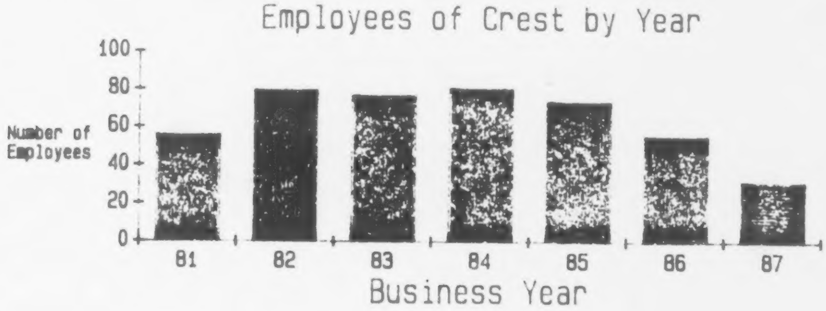
The original Crest product is on the right in both photographs. The Taiwan company made a slight change to avoid a clear patent violation. Can you detect it? Nowhere on this copy is a mark indicating, "Made in Taiwan".

IMPACT UPON CREST INDUSTRIES INC.

Crest feels compelled to comment upon the profound impact these two instances relating to patents have had upon the company.



Graph showing that revenues lost by Crest were directly related to its telephone product line. All revenue lost to date, (nearly 10 million dollars), has been from lost telephone sales, other products have remained almost constant. However, Crest expects that in business year 1988 revenues from other products to drop at least $250,000 because of product copying.



Graph showing loss of employees caused by declining sales. There have been at least 35 people directly associated with Crest who have lost their jobs because of these issues. This accounting does not reflect those people and companies closely associated with Crest, that supply Crest with materials and services, who have also been deeply affected.

Beyond the accounting for sales and jobs is the fundamental loss of the ability to further compete by innovation. A hinderance of the ability to further develop product, grow, and provide a secure future.

COMMENTS AND OBSERVATIONS

The cases cited above hopefully present clear and understandable examples of fundamental problems with the patent process. Crest considers the process almost unuseable for the small American manufacturer.

Three years wait for a patent to be issued is too long. The need to employ a law firm to search, write, and construct drawings for a patent makes the process too expensive.

Five years for a court settlement of a patent case is too long. The need to employ a law firm for this defense for this period of time is too costly for the small manufacturer.

Product copying needs to be prevented. It is unconscionable that a company be allowed to make direct copies of anothers product. The customer has not benefited. A customer is not served by a company that copies. A company that copies is without substance and one that will have an inability to develop future product. It simply is not developing those skills necessary to develop and market a product.

American manufacturing companies need the protection that the patent was envisioned to offer. Without it, there is little incentive to compete by innovation and new product development.

The intent of the patent process is good, even noble, protect an inventor until this person has had time to recapture initial investment. However, all too often this goal is not accomplished.

Crest realizes all to well that these troubles seem small to most people. However, the problems that Crest encounters in its day to day business are typical of most United States firms. They are very real problems without real solutions. They cannot, and should not be dismissed as "economic adjustment", "results of competition", or even "bad or unskilled management".

The inability of a small company, because of time and money, to obtain a patent then defend that patent is a serious problem with enormous ramifications for American business.

In the short run the loser is the American manufacturer he goes out of business, or gives up and goes to the asian manufacturer for his product. In the long run the big loser is the U.S. and the American worker. Developing products and markets takes great skill and resources.

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